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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 45

PHILLIPS-JONES CORPORATION, INDIVIDUALLY, AND ANNIE G. PHILLIPS, ET AL., PETITIONERS,

vs.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MAY 7, 1937.

CERTIORARI GRANTED JUNE 1, 1937.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 22, 1937.
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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARCH TERM, 1935

In Equity. No. 7715

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, Seymour J. Phillips and Abraham S. Phillips, Surviving Executors under the Will of I. L. Phillips, Deceased, Plaintiffs,

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. Coombe, Roy Updegrave, Alvaretta Updegrave, Administratrix of the Estate of R. R. Updegrave, Deceased, and Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased, Defendants

U. J. Mengert, Esq., Montgomery & McCracken, Esqs.

J. C. Noonan, Esq., for C. S. Parmley. P. Wallis, Esq., for E. E. Scott.

DOCKET ENTRIES

May 22, 1933. Bill of complaint filed.

May 22, 1933. Subpœna exit, returnable June 12, 1933.

June 5, 1933. Subpœna returned: on May 23 served Thomas Noonan, on May 24, served C. S. Parmley, C. H. [fol. 2] Parnell, I. A. Coombe, T. H. Coombe and Roy Updegrave, A. Noonan and R. R. Updegrave, deceased; Alice Guldin not found, E. E. Scott, not requested to serve—and filed.

June 6, 1933. Appearance of J. C. Noonan Esq. for C. S. Parmley, filed.

June 13, 1933. Answer by C. S. Parmley filed.

June 16, 1933. Appearance of Philip Wallis Esq. for E. E. Scott filed.

Oct. 5, 1933. Answer by E. E. Scott filed.

Apr. 12, 1935. Notice of motion to amend filed.

Apr. 12, 1935. Plaintiffs' motion to amend bill of complaint filed.

Apr. 12, 1935. Order of court allowing amendment, substituting certain parties and dismissing bill as to Austin Noonan and Thomas Noonan, Executors etc. without prejudice, filed.

DOCKET ENTRIES—Continued

Apr. 16, 1935. Amended Bill of Complaint filed.

Apr. 16, 1935. Subpœna exit—returnable May 6, 1935.

Apr. 25, 1935. Answer of C. S. Parmley to amended bill of complaint filed.

Apr. 29, 1935. Answer of E. E. Scott to amended bill of complaint filed.

May 1, 1935. Præcipe to place case on trial list filed.

May 11, 1935. Appearance of P. B. Roads, Esq., for Margaret Wilkinson, Admx., filed.

[fol. 3] May 11, 1935. Motion by Margaret Wilkinson, Admx., etc. to dismiss amended bill filed.

May 11, 1935. Præcipe to place case on argument list filed.

May 21, 1935. Præcipe to place case on argument list filed.

July 9, 1935. Subpœna returned: On Apr. 22, 1935, served A. Updegrave and on Apr. 23, 1935, served M. Wilkinson and filed.

Mar. 20, 1936. Argued sur motion to dismiss amended bill of complaint.

Apr. 16, 1936. Opinion, Dickinson, J., dismissing bill of complaint for want of equity filed.

May 11, 1936. Petition of plaintiffs for rehearing and order of Court granting rule to show cause thereon filed.

June 24, 1936. Answer of Margaret Wilkinson, Admx. etc. to petition for rehearing filed.

June 24, 1936. Argued sur petition for rehearing.

July 7, 1936. Opinion of Dickinson, J., denying motion for re-argument filed.

July 27, 1936. Decree dismissing Bill of Complaint filed.

July 27, 1936. Assignment of Errors filed.

July 27, 1936. Petition for Appeal filed.

July 27, 1936. Decree granting appeal filed.

Aug. 5, 1936. Bond sur appeal in $250.00 with National Surety Corp. surety and Decree approving bond filed.

[fol. 4] Aug. 5, 1936. Citation allowed and issued.

Aug. 5, 1936. Copy of notice of appeal filed.

Aug. 15, 1936. Præcipe for Transcript of record filed.

Sept. 4, 1936. Order of Court extending return day of citation for fifteen days filed.

Sept. 8, 1936. Citation returned with Marshal's return of service and filed.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED BILL OF COMPLAINT—Filed April 16, 1935

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Plaintiffs bring this their amended bill against defendants and complain and say:

1. Plaintiff, Phillips-Jones Corporation, is incorporated and exists under the laws of the State of New York and is [fol. 6] a citizen thereof and has its principal place of business at 1225 Broadway, New York City, in said State.

2. Plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, are the surviving duly qualified and acting executors under the will of I. L. Phillips, deceased. Said I. L. Phillips died a citizen and resident of the county and State of New York on November 22, 1923. Said Annie G. Phillips is a citizen of the State of New York and resides at 16 West Seventy-seventh Street, New York City, in said State. Said Seymour J. Phillips is a citizen of the State of New York and resides at 7 Wensley Drive, Great Neck, Long Island, in said State, and said Abraham S. Phillips is a citizen of the State of New York and resides at 888 Park Avenue, New York City, in said State.

3. Defendant, C. S. Parmley, is a citizen of the State of Pennsylvania and resides at Mahanoy City, in said State.

4. Defendant, C. H. Parnell, is a citizen of the State of Pennsylvania and resides at Minersville, in said State.

5. Defendant, Effie E. Scott, is a citizen of the State of Pennsylvania and resides at Minersville in said State.

6. Defendant, I. A. Coombe, is a citizen of the State of Pennsylvania and resides at Minersville, in said State.

7. Defendant, T. H. Coombe, is a citizen of the State of Pennsylvania and resides at 613 Magnolia Avenue, Aldan, Delaware County, in said State.

8. Defendant, Roy Updegrave, is a citizen of the State of Pennsylvania and resides at Valley View, in said State.

[fol. 7] 9. Defendant, Alvaretta Updegrave, is administratrix of the estate of R. R. Updegrave, deceased, and is

a citizen of the State of Pennsylvania and resides at Valley View, in said State. Said R. R. Updegrave, at the time of his death, was a citizen of the State of Pennsylvania and resided at Valley View, in said State.

10. Defendant, Margaret Wilkinson, is administratrix d. b. n. c. t. a. of the estate of B. C. Guldin, deceased, and is a citizen of the State of Pennsylvania and resides at Minersville, in said State. Said B. C. Guldin, at the time of his death, was a citizen of the State of Pennsylvania and resided at Minersville, in said State.

11. The ground upon which the jurisdiction of this Court is invoked is diversity of citizenship between the parties hereto and the amount of controversy herein exceeds $3000, exclusive of interest and costs.

12. On or about July 15, 1919, there was in existence a corporation known as The Coombe Garment Company, organized and existing under the laws of the State of Pennsylvania, with an office and place of business at 1046 South Fifty-eighth Street, Philadelphia, Pa. Said corporation between July 15, 1919, and September 27, 1919, liquidated its business and distributed its assets as liquidating dividends to its stockholders. The names of the stockholders as of those dates, the percentage of their holdings to the entire amount of stock issued and outstanding, and the amount received by each of said stockholders in liquidation are as set forth in the following table:

Name of Stockholder	Percentage of Stockholdings	Amount Received in Liquidation
B. C. Guldin	20	$9,211.68
I. L. Phillips	25	11,514.60
F. J. Noonan	5¼	2,418.07
[fol. 8]		
C. S. Parmley	5¼	2,418.07
C. H. Parnell	2	921.16
Effie E. Scott	8¾	4,030.11
Max Phillips	13⅛	6,045.16
I. A. Coombe	2⅝	1,209.02
T. H. Coombe	5	2,302.92
R. R. Updegrave	9	4,145.25
Roy Updegrave	4	1,842.34

Wherever the above names have appeared in this bill, the persons referred to are one and the same.

13. Said F. J. Noonan, one of the above-named stockholders, died May 7, 1922, a citizen and resident of Mahanoy City, State of Pennsylvania. His widow, Mary L. Noonan, was appointed administratrix of his estate by the Register of Wills of Schuylkill County, Pennsylvania. She duly filed her first and final account as said administratrix, which was audited and distribution decreed and made in accordance with the laws of Pennsylvania thereunto applicable and she was discharged as administratrix on or about October 6, 1924. By virtue of the said facts, plaintiffs aver that no recovery can be had on account of the stock held by or liquidating dividend paid to said F. J. Noonan.

14. In February, 1925, the United States Commissioner of Internal Revenue assessed against said The Coombe Garment Company, an additional income and profits tax for the year 1918 of $277.75, and in December, 1924, assessed against said The Coombe Garment Company, an additional income and profits tax for the year 1919 of $9124.68. The amount of $96.07 of the additional tax assessed against the corporation for 1918 was paid by the corporation, leaving $9306.36 unpaid tax due from the corporation for the years involved. On or about June 16, [fol. 9] 1926, the Commissioner of Internal Revenue proposed for assessment against said I. L. Phillips, as one of the transferees of the assets of The Coombe Garment Company, the said sum of $9306.36, representing unpaid income and profits taxes assessed against that company for the years 1918 and 1919. The proposed assessment was based upon section 280 of the Revenue Act of 1926 (26 U. S. C. A., sec. 1069).

15. Plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips (together with Arthur L. Phillips, now deceased) executors under the will of I. L. Phillips, deceased, petitioned the United States Board of Tax Appeals for a redetermination of the alleged deficiency tax and prosecuted their claim for a redetermination to the Second Circuit Court of Appeals and the United States Supreme Court. Their position was that The Coombe Garment Company was not liable for the tax in question; that their decedent, I. L. Phillips, as a transferee of the assets of The Coombe Garment Company, was not liable to pay the same because the transferee proceedings against him were un-

constitutional, and that if there was liability it was only in proportion to his stockholdings. Judgment finally went against the contention of said plaintiffs and the reasons therefor are expressed in the opinion of the United States Supreme Court reported at 283 U. S. 589.

16. The amount of the judgment finally rendered in favor of the Government and against plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips (together with Arthur L. Phillips, now deceased) executors under the will of I. L. Phillips, deceased, was, including interest and certain of the costs, the sum of $12,340.10. The amount of disbursements in connection with the said proceedings totaled the sum of $1369.53. The aggregate of all legal fees paid to the date of the judgment in connection with the [fol. 10] said proceedings was the sum of $2000, making a grand total of $15,709.63.

17. The stock of The Coombe Garment Company, held in the name of I. L. Phillips and Max Phillips, respectively, at the time of its liquidation in 1919, was wholly owned by plaintiff, Phillips-Jones Corporation. Said I. L. Phillips and Max Phillips were merely nominal holders and held all of the stock registered in their names for the use and benefit of plaintiff, Phillips-Jones Corporation. The liquidating dividends received by I. L. Phillips and Max Phillips, as stated in paragraph 12 hereof, were forthwith paid over by them to plaintiff, Phillips-Jones Corporation, the real owner of the stock held in those names. Said plaintiff, Phillips-Jones Corporation, paid all of the amounts hereinbefore set forth, namely, the judgment, disbursements and legal fees, totaling $15,709.63, on the following dates:

	Amount	Date Paid
Judgment of	$12,340.10	August 17, 1931
Disbursements of	1,369.53	March 28, 1928, to October 1, 1931
Legal fees of	2,000.00	August 2, 1930, to October 1, 1931

18. Said The Coombe Garment Company has not had any property or assets and has not transacted any business since September 30, 1919, when, as above stated, it completed the distribution of all of its property and assets to its stockholders. It has no means of paying any of the

amount paid by plaintiff, Phillips-Jones Corporation, as hereinbefore stated.

19. Plaintiff, Phillips-Jones Corporation, has made demand upon all of the defendants for the payment to it of their respective contributive shares to reimburse it for the sum paid in excess of its proper share of said additional tax. [fol. 11] All of the defendants have failed, neglected and refused to contribute to said plaintiff, Phillips-Jones Corporation.

20. Plaintiff, Phillips-Jones Corporation, has no knowledge of the means or financial responsibility of the defendants and has no knowledge of their respective ability to pay their contributive shares.

Wherefore, plaintiffs ask for equitable relief, as follows:

(a) That the duty of the several defendants to contribute to plaintiff shall be decreed.

(b) That the several defendants shall be directed and ordered to make discovery of their financial responsibility sufficiently to determine whether or not each of them is able to make contribution and the extent thereof.

(c) That the Court shall order and decree the amount, or amounts, to be paid to plaintiff, Phillips-Jones Corporation, by each of the defendants.

(d) Such other and further relief as may be proper in the premises.

Ulric J. Mengert, Montgomery & McCracken, Attorneys for Plaintiffs.

[fol. 12] *Duly sworn to by Louis J. Treuhoft. Jurat omitted in printing.*

[fol. 13] IN UNITED STATES DISTRICT COURT

ANSWER OF C. S. PARMLEY, DEFENDANT, TO AMENDED BILL OF COMPLAINT—Filed April 25, 1935

Charles S. Parmley, one of the defendants in the above-captioned proceedings, reserving to himself all manner and right of exception to the amended bill of complaint, for

answer to said amended bill of complaint or to so much thereof as said defendant is advised it is necessary or material for him to make answer unto, answering, says:

1. Defendant admits the averment contained in the first paragraph of plaintiffs' amended bill of complaint.

2. Defendant denies any knowledge as to any of the allegations contained in the second paragraph of plaintiffs' amended bill of complaint.

3. Defendant admits the averment contained in the third paragraph of plaintiffs' amended bill of complaint.

4. Defendant denies any knowledge as to any of the allegations contained in the fourth paragraph of plaintiffs' amended bill of complaint.

5. Defendant denies any knowledge as to any of the allegations contained in the fifth paragraph of plaintiffs' amended bill of complaint.

6. Defendant denies any knowledge as to any of the allegations contained in the sixth paragraph of plaintiffs' amended bill of complaint.

7. Defendant admits the averment contained in the seventh paragraph of plaintiffs' amended bill of complaint.

[fol. 14] 8. Defendant denies any knowledge as to any of the allegations contained in the eighth paragraph of plaintiffs' amended bill of complaint.

9. Defendant denies any knowledge as to any of the allegations contained in the ninth paragraph of plaintiffs' amended bill of complaint.

10. Defendant denies any knowledge as to any of the allegations contained in the tenth paragraph of plaintiffs' amended bill of complaint.

11. Defendant admits the diversity of citizenship but denies any knowledge as to the allegation contained in the eleventh paragraph of plaintiffs' amended bill of complaint relative to the amount in controversy. As to said allegation defendant demands proof that said amount in controversy exceeds three thousand dollars, exclusive of interest and costs.

12. Defendant admits the averment that in 1919, Coombe Garment Company liquidated its business and distributed

to him, as owner of 5¼ per cent. of the stock of Coombe Garment Company, a liquidating dividend of $2418.07 as set forth, inter alia, in the twelfth paragraph of plaintiffs' amended bill of complaint. Defendant denies any knowledge as to the other allegations contained in said paragraph and demands proof thereof, if they be material.

13. Defendant admits that F. J. Noonan, one of the stockholders of Coombe Garment Company, died in May, 1922, a citizen and resident of Mahanoy City, State of Pennsylvania; also that his widow, Mary L. Noonan, was appointed administratrix of his estate and duly filed her first and final account as administratrix, which account was audited and distribution decreed and made in accordance with the laws [fol. 15] of Pennsylvania, and further that the said Mary L. Noonan was discharged as administratrix on or about October 6, 1924. Defendant avers that the other allegations made by plaintiffs in paragraph 13 of the amended bill of complaint set forth conclusions of law which, in view of the facts hereinafter set forth, are irrelevant and immaterial.

14. Defendant denies any knowledge as to any of the allegations contained in the fourteenth paragraph of plaintiffs' amended bill of complaint. As to said allegations, defendant demands proof.

15. Defendant admits the averments contained in the fifteenth paragraph of plaintiffs' amended bill of complaint as to the appeal prosecuted to the Supreme Court of the United States, reported in 283 U. S. 589.

16. Defendant admits that judgment was finally rendered in favor of the Government and against plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips (together with Arthur L. Phillips, now deceased), executors under the will of I. L. Phillips, deceased, in the sum of $12,340.10. Defendant denies any knowledge as to the amount of disbursements in connection with said proceedings and as to legal fees paid to the date of the judgment and, therefore, demands proof of the amount of said disbursements and legal fees, if proof of said allegations be material.

17. Defendant denies any knowledge as to any of the allegations contained in the seventeenth paragraph of plain-

tiffs' amended bill of complaint and demands proof thereof, if proof of said allegations be material. Defendant avers that the relations existing between I. L. Phillips, Max Phillips and Phillips-Jones Corporation at the time of liquidation of Coombe Garment Company in 1919 and subsequently [fol. 16] thereto are irrelevant and have no bearing on the issue raised by the present proceedings. On the contrary, defendant avers that, inasmuch as the Government's claim for unpaid taxes under Section 280 (1) can be collected only from a transferee who has received property from the corporation, said Government's claim could only exist against I. L. Phillips and/or Max Phillips, and any right to contribution from defendant must depend upon the successful prosecution of the Government's claim against either or both of said persons and his or their satisfaction of the Government's claim in said proceedings. As stated above, all the allegations made in paragraph 17 of plaintiffs' amended bill of complaint having to do with payments by Phillips-Jones Corporation of the amount of the judgment, disbursements and legal fees due by Coombe Garment Company are irrelevant and, for the reasons hereinafter set forth, have no bearing on the present proceedings.

18. Defendant admits the averment contained in the eighteenth paragraph of plaintiffs' amended bill of complaint.

19. Defendant admits that on or about November 17, 1931, plaintiff made demand upon him for payment of his alleged contributive share to reimburse plaintiff for the alleged excessive share of the tax paid by plaintiff, Phillips-Jones Corporation. Defendant admits that, for the reasons hereinabove and hereinafter set forth, he has failed, neglected and refused to contribute to the plaintiff corporation.

20. Defendant admits that plaintiff corporation has no knowledge of the means or financial responsibility of the defendants and that plaintiff corporation has no knowledge of the ability of the respective defendants to pay their contributive shares.

[fol. 17] For a separate and affirmative defense, the defendant, C. S. Parmley, alleges:

21. That the plaintiff, Phillips-Jones Corporation, was under no legal obligation to pay the amount of the tax as-

sessed against Coombe Garment Company inasmuch as it was not a stockholder of Coombe Garment Company and did not receive from Coombe Garment Company a liquidating dividend in excess of the amount of the tax. Said plaintiff corporation was not a transferee within the meaning of Section 280 (a) (1) of the Revenue Act of February 26, 1926, Chapter 27, and consequently could not be compelled to pay the amount of the tax assessed against the Coombe Garment Company. Defendant avers that if the amount of said tax, plus legal fees and costs, was paid by plaintiff corporation as averred in the seventeenth paragraph of plaintiffs' amended bill of complaint, plaintiff corporation is a mere volunteer and, as such, is not entitled to contribution from defendants.

22. That the plaintiffs, Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, are not entitled to contribution inasmuch as their decedent, I. L. Phillips, did not pay the amount of the tax assessed against Coombe Garment Company. Said plaintiff-executors are entitled to contribution only if their decedent was obliged to pay more than his proportionate share of the tax, and, having paid no portion of the tax, are entitled to no contribution.

23. That it was the duty of I. L. Phillips, when notified of the proposed assessment of the full amount of the tax against him on or about June 16, 1926, to notify immediately all stockholders receiving a liquidating dividend of the [fol. 18] proposed assessment and of the possibility of their being compelled to respond in their respective shares in order to afford to said stockholders an opportunity to participate in the defense of the Government's claim. That the said I. L. Phillips, not having done this, is not entitled to contribution from the defendants, and, inasmuch as the rights of plaintiff corporation can in no event rise higher than those of I. L. Phillips, plaintiff corporation is likewise not entitled to contribution.

24. That, for the reasons given above and for other good and sufficient reasons, neither I. L. Phillips, the personal representatives of I. L. Phillips, nor the plaintiff corporation is entitled to contribution from the respective defendants, by reason of the facts set forth in plaintiffs' amended bill of complaint.

Wherefore, the defendant, Charles S. Parmley, prays that this Honorable Court dismiss the amended bill of complaint, with his reasonable costs and charges in this behalf most wrongfully sustained.

John C. Noonan, Attorney for C. S. Parmley, Defendant.

IN UNITED STATES DISTRICT COURT

ANSWER OF EFFIE E. SCOTT—Filed April 29, 1935

To the Honorable, the Judges of Said Court:

The defendant, Effie E. Scott, answering the amended bill of complaint herein says:

1. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 1 of the amended bill of complaint [fol. 19] are true, and demands proof thereof if material.

2. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 2 of the amended bill of complaint are true, and demands proof thereof if material.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted, except that the residence of said T. H. Coombe is said to be in Philadelphia, Pennsylvania.

8. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 8 of the amended bill of complaint are true, and demands proof thereof if material.

9. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 9 of the amended bill of complaint are true, and demands proof thereof if material.

10. Admitted, as to the late citizenship and residence of B. C. Guldin, deceased; defendant has no knowledge,

and after reasonable investigation is unable to ascertain whether or not the remaining facts alleged in paragraph 10 of the amended bill of complaint are true, and demands proof thereof if material.

11. Defendant admits the amount in controversy herein exceeds $3000 exclusive of interest and costs. Defendant [fol. 20] admits that the ground upon which the jurisdiction of this Court is invoked is the alleged diversity of citizenship between the parties hereto.

12. Defendant admits that on or about July 15, 1919, there was in existence a corporation known as "The Coombe Garment Company" organized and existing under the laws of Pennsylvania, and that said corporation between July 15, 1919 and September 27, 1919, liquidated its business and distributed its assets as liquidating dividends to its stockholders. Defendant admits that she was the owner of 8¾ per cent. of the issued and outstanding stock of said corporation, and that she received in liquidation $4030.11. As to the other averments of paragraph 13 of the amended bill of complaint, defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged are true, and demands proof thereof if material.

13. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 13 of the amended bill of complaint are true, and demands proof thereof if material. Defendant further avers that the statement contained in the last sentence of said paragraph is a conclusion of law, and does not require an answer on the part of this defendant.

14. Defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 14 of the amended bill of complaint are true, and demands proof thereof if material.

15. Defendant admits that the persons named in paragraph 15 of the amended bill of complaint petitioned the United States Board of Tax Appeals for a redetermination [fol. 21] of the alleged deficiency tax, and prosecuted their claim for a redetermination in the Second Circuit Court of Appeals and the United States Supreme Court, and that

judgment was finally entered against the persons named in paragraph 15 of the amended bill of complaint. Defendant has no knowledge, and after reasonable investigation, including interviews with or attempts to interview an official, certain stockholders, and the accountant for the company, and examination of the decisions in the matter, is unable to ascertain the position or contentions of the said parties in said proceedings, and demands proof thereof if material, but defendant is informed, believes and therefore avers, as more fully hereinafter stated, that plaintiffs did not contest the liability of The Coombe Garment Company, transferor, on the merits.

16. So far as costs, disbursements and fees are concerned, defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not the facts alleged in paragraph 16 of the amended bill of complaint are true; furthermore, means of proof of the same are under the exclusive control of plaintiffs, and defendant demands proof thereof if material.

17. Defendant avers that she has no knowledge of the facts alleged in paragraph 17 of the amended bill of complaint, and that means of proof of the same are under the exclusive control of plaintiffs, and demands proof thereof if material.

18. Admitted.

19. Defendant admits that she has refused to contribute to the plaintiff, Phillips-Jones Corporation Defendant denies that any demand had been made upon her for the payment of her alleged contributive share prior to March 21, 1933, except as hereinafter stated. As to the other [fol. 22] facts alleged in paragraph 19 of the amended bill of complaint, defendant has no knowledge, and after reasonable investigation is unable to ascertain whether or not such facts are true, and demands proof thereof if material.

20. Means of proof of the facts alleged in paragraph 20 of the amended bill of complaint are under the exclusive control of the plaintiffs, and defendant demands proof thereof if material.

And for a further and affirmative defense to the plaintiffs' claim, the defendant, Effie E. Scott, alleges:

21. That notwithstanding the alleged facts as set forth in paragraph 14 of the amended bill of complaint to the effect that assessments against The Coombe Garment Company were made in December, 1924, and February, 1925, and an assessment against said I. L. Phillips on or about June 16, 1926, and that, as alleged in paragraph 15 of the amended bill of complaint, the executors petitioned the United States Board of Tax Appeals for a redetermination of the alleged deficiency tax, and that said Board handed down a decision on April 2, 1929 (15 B. T. A. 1218), and that an appeal was then taken to the Second Circuit Court of Appeals where a decision was handed down on June 9, 1930 (42 Fed. 2d 177), defendant was not informed as to the existence of the assessment against said I. L. Phillips, or the prosecution of the litigation, or given an opportunity to defend the same or to pay, as she might determine, until on or about July 30, 1930, when she received a letter from one Herman Goldman claiming to represent the executors of the estate of Isaac L. Phillips, setting forth the alleged history of the litigation to that date and requesting an expression of defendant's wishes as to the prosecution of an appeal to the United States Supreme Court.

[fol. 23] 22. That the decision of the Board of Tax Appeals and consequently of the Appellate Courts, was based upon a stipulation of facts, the contents whereof are unknown to deponent, and if material she prays discovery thereof, which stipulation of facts was agreed to by the executors of the estate of I. L. Phillips or their counsel without notice to or the knowledge or consent of defendant, thus prejudicing defendant's position by depriving her of an opportunity to contest the facts upon which the Government based its claim of tax liability.

23. That the failure of I. L. Phillips and the plaintiffs to notify defendant of the existence of the assessment against them and of the circumstances in connection therewith until July 30, 1930, the date of said Herman Goldman's letter, prejudiced defendant in that defendant is informed, believes and therefore avers that certain of the other stockholders of The Coombe Garment Company who were living and/or solvent in the years 1924, 1925 and 1926, thereafter and prior to July 30, 1930 either became in-

solvent or financially embarrassed or died, and their estates were, became or are insolvent or were disposed of by distribution; that defendant has no means of knowledge as to all of the material facts alleged in this paragraph, and therefore, for the purposes of this averment, joins in the prayer of the amended bill of complaint for discovery as to the financial responsibility on July 30, 1930 and subsequently thereto of the several stockholders who received liquidating dividends and their estates.

24. That the said actions of plaintiffs have subjected defendant, if liable, without notice or knowledge or consent on her part, to large additional claims for interest, expenses and costs of litigation incurred in the prolonged [fol. 24] defense to the claim of the Government.

25. That plaintiff corporation was not a stockholder of The Coombe Garment Company, and was not liable to pay taxes assessed against it, and was not assessed directly as a transferee of its assets, and consequently paid the taxes in question as a mere volunteer.

26. That defendant is informed, believes and therefore avers that I. L. Phillips or someone acting on behalf of him or of the plaintiffs, without notice to or knowledge or consent of defendant on or about February 9, 1924 executed a waiver on behalf of The Coombe Garment Company waiving the Statute of Limitations in respect of a portion of the alleged tax liability.

27. The defendant is informed, believes and therefore avers that in the litigation aforesaid the plaintiffs failed to present such defenses as were available to The Coombe Garment Company and failed to contest the validity or amount of the assessment against The Coombe Garment Company, but defended on other grounds.

Wherefore, defendant prays that she may be hence dismissed with her costs in this behalf sustained.

And she will ever pray.

Effie E. Scott. Philip Wallis, Attorney for Defendant, Effie E. Scott.

[fol. 25] *Duly sworn to by Effie E. Scott. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS AMENDED BILL OF COMPLAINT—Filed May 11, 1935

And Now, to wit, May 11, 1935, P. B. Roads, attorney for Margaret Wilkinson, administratrix d. b. n. c. t. a. of the state of B. C. Guldin, deceased, one of the defendants above named, hereby moves the Court to grant a rule on Phillips-Jones Corporation, individually, and Annie G. Phillips, Seymour J. Phillips, and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, plaintiffs above named, to show cause why the amended bill of complaint filed should not be dismissed for the following matters appearing upon the face of the record, to wit:

[fol. 26] (1) An inspection of said amended bill of complaint filed shows that the United States Commissioner of Internal Revenue assessed against said I. L. Phillips, as one of the transferees of the assets of the Coombe Garment Company, the sum of nine thousand three hundred six dollars and thirty-six cents ($9,306.36), representing unpaid income and profits taxes assessed against that company for the years 1918 and 1919. But it is neither alleged nor shown that either the said I. L. Phillips or the said Annie G. Phillips, Seymour J. Phillips, and Abraham S. Phillips, surviving executors under the will of the said I. L. Phillips, deceased, paid the said sum of $9,306.36, or any part thereof, and further, that the judgment finally rendered against said executors under the will of the said I. L. Phillips, deceased, upon said assessment by the United States Commissioner of Internal Revenue, including interest and certain of the costs, in the sum of twelve thousand three hundred forty dollars and ten cents ($12.340.10), was paid voluntarily and not under compulsion by the said Phillips-Jones Corporation.

(2) It is nowhere alleged nor shown in said amended bill of complaint, inter alia, that the said Margaret Wilkinson, individually, or that the said B. C. Guldin, his heirs, executors or administrators, or assigns, received notice that the United States Commissioner of Internal Revenue had made the said assessment against the said I. L. Phillips as one of the transferees of the assets of the

Coombe Garment Company, representing unpaid income and profits taxes assessed against that company for the years 1918 and 1919, in time to make a defense thereto and protect the interests of the said B. C. Guldin, his heirs, executors, administrators, or assigns, before the said assessment had been litigated to final judgment in favor of [fol. 27] the United States Commissioner of Internal Revenue and against the executors of the estate of the said I. L. Phillips, deceased.

(3) It is nowhere averred in said amended bill of complaint that the said B. C. Guldin or either or any of his heirs or representatives or assigns agreed to pay all or pay any part of the said assessment made by the United States Commissioner of Internal Revenue against the said I. L. Phillips, or any of the costs, expenses, or fees attendant upon the litigation instituted by the executors of the said I. L. Phillips, deceased, in defense of and to prevent the collection of the said assessment by the United States Commissioner of Internal Revenue.

P. B. Roads, Attorney for Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased, One of the Defendants Above Named.

[fol. 28] IN UNITED STATES DISTRICT COURT

Argued March 20, 1936

OPINION SUR MOTION TO DISMISS BILL—Filed April 16, 1936

DICKINSON, J.:

Leave was granted to file Supplemental Briefs. These have now been received.

This case has unusual features. The Coombe Garment Company was a Pennsylvania corporation. In July or September 1919 it wound up its affairs and distributed its assets among its stockholders. This would seem to have been wholly the act of its stockholders. There was no winding up of its affairs and dissolution of the corporation by judicial decree is provided by the Pennsylvania Statutes. Act of April 9th, 1856, P. L. 293

Stock of the company stood in the name of I. L. Phillips. This stock really belonged to the Phillips-Jones Corporation. Incidentally the name of the plaintiff corporation suggests that Phillips was likewise interested in it. The defendants were also stockholders of the Coombe Company. Of the stock of the latter Phillips held 25 per cent and was its largest stockholder. We may take it for granted that all the indebtedness of the Coombe Corporation so far as acknowledged by it was paid before distribution of its assets. The United States, however, had a claim for "additional income and profits tax". for the years 1918 and 1919. No additional tax was however assessed or levied until December 1924 and February 1925 against [fol. 29] the corporation. On June 16th, 1926 an assessment was made against I. L. Phillips as a "transferee of the assets of the Coombe Company". This assessment was made by authority of Section 280 of the Revenue Act of 1926, 26 U. S. C. A. Section 1069. No explanation appears of why the assessment was made against Phillips alone. The sum assessed was $9306.36. The dividend he had received from the Coombe Company was $11,514.60. No notice was given to the other stockholders. Phillips resisted the lawfulness of the assessment against him, carrying his resistance to the Supreme Court. The Court gave a ruling against him.

Phillips et al. Executors, v. Commissioner Internal Revenue, 283 U. S. 589.

Thereupon the Phillips-Jones Company paid the assessment. The judgment paid August 31st, 1931 was $12,340.10. In addition to this they made disbursements for counsel fees &c. of $3369.53. It does not appear why the Phillips-Jones Corporation paid this judgment other than it is averred that the stock which stood in the name of I. L. Phillips belonged to the corporation. Demand was made upon defendants for contribution. All the stockholders other than I. L. Phillips were made defendants in the present Bill except F. J. Noonan and Max Phillips. It is explained that Noonan was not made a defendant because he was deceased and his estate settled. It is not explained why Max Phillips was not made a defendant unless the name suggests the reason or more probably making him a defendant would have ousted this Court of jurisdiction of the cause.

The demurrer, as a motion to dismiss is, sets out three grounds of demurrer.

1. I. L. Phillips did not pay the assessment sought to be recovered by the defendants and the payment thereof was a [fol. 30] voluntary payment by the Phillips-Jones Corporation which gave it no claim to contribution.

2. The defense had no notice of the assessment against Phillips nor any opportunity to defend thereto.

3. There is no averment of any promise by the defendants to pay any part of the assessment against Phillips.

Discussion

This is a claim for contribution. The plaintiff had assessed against him a tax for which he was no more liable than other stockholders. There is a more or less loose idea of what is fair which calls upon the others to contribute their just share of a tax burden which any of them might have been called upon to pay, limited only by what they had received of the assets of the corporation of which they were all stockholders. A Court however can impose upon them only the legal or equitable liability which they have incurred.

There are standards by which we can measure and appraise the liability for which the law calls. There is no standard of what is fair and right from the ethical viewpoint. Some might think that there is nothing fair nor right in calling upon stockholders to pay additional taxes assessed against a corporation five years after taxes had been assessed against it and paid and five years after its affairs had been wound up and its assets distributed on the assumption that the payment of the taxes which had been assessed against it, paid its taxes in full nor is there anything fair or right in exacting payment of one stockholder instead of all. The Court has nothing to do with what is fair and right in the ethical sense. The question is what is the law?

We start with the proposition that the stockholders were under no legal obligation to pay the taxes of the corporation. [fol. 31] The liability is one imposed upon them by the strong arm of the law. The law, it is true, requires of them only to pay out of the assets of the corporation in which they have shared. This, however, is merely the motive for the imposition.

The legal liability rests solely upon the assessment. Phillips was bound to pay the tax because it was assessed against him. No tax was assessed against the defendants and hence

none of them were legally bound to pay. That is not the ground upon which their liability is placed. The ground is that Phillips paid the whole tax; that there was the same reason for assessing the others which there was for assessing him, and the ergo is that the others should reimburse him to the extent of their proportionate shares.

We accept the equitable doctrine relied upon by the plaintiff that when one is forced to pay a debt owing by himself and others he has a legal right to enforce contribution. The basis of it however is the debt obligation of the contributors. Here there is no debt obligation and hence no legal obligation to contribute. The most which can be said, and all which is averred in this Bill is that the tax which was assessed against Phillips might have been assessed against the defendants. Conceding that it might, the fact remains that it was not assessed. Neither the possibility nor liability to assessment imposed the tax. It was imposed wholly by the assessment and imposed upon Phillips alone. This was his misfortune. It may be and doubtless is true that he might have demanded that the tax be assessed against all. If it had been each would have been liable in solido for the whole up to what he had received from the corporation. If one had under compulsion paid the whole tax he could have enforced contribution from the others. Here, again, however, the demand would have rested [fol. 32] upon the debt obligation. None, we repeat, is averred in this Bill. Again, Phillips when he was assesed might have asked the others to agree that he should oppose the assessment on behalf of all and that the others would contribute. If they had so agreed there would have been a debt obligation. None however is averred.

An analogue is supplied by tort feasors whose negligence has contributed to an injury. Each is liable to the person injured and either may alone be made a defendant and compelled to pay the whole damage. This, it may be said, is not fair nor just. The law of Pennsylvania has recognized this and provided a remedy. Without it, however, the defendant sued would not have a legal right to contribution notwithstanding that it might well be said that he "ought" to be reimbursed. This is the claim presented by this Bill. The view taken renders it unnecessary to discuss the special grounds of demurrer.

A decree dismissing the Bill for want of equity may be submitted.

IN UNITED STATES DISTRICT COURT

PETITION OF PLAINTIFFS FOR REHEARING—Filed May 11, 1936

To the Honorable O. B. Dickinson, Judge of the District Court, for the Eastern District of Pennsylvania:

The petition of the plaintiffs in the above-entitled cause respectfully represents:

1. The Amended Bill of Complaint herein filed avers that plaintiff, Phillips-Jones Corporation, had, as real owner, held stock in the name of I. L. Phillips (whose executors are also plaintiffs herein) in a certain corporation, namely, the [fol. 33] Coombe Garment Company, which owed corporate taxes to the United States after the said corporation had completed the distribution of all its property and assets to its stockholders. The United States enforced the liability of the said stockholder as a transferee of the assets of the corporation under Section 280 of the Revenue Act of 1926 and compelled the payment of the entire amount of said tax by plaintiffs herein. The relief sought is contribution from the other stockholders in proportion to the liquidating dividends received by them.

2. Answers were filed by defendants Parmley and Scott. A motion to dismiss the amended bill of complaint was filed by defendant Wilkinson, administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, which raised three questions, namely, (1) that Phillips-Jones Corporation made the payment, for which contribution was sought, voluntarily and not under compulsion, (2) that it was not averred that notice had been received by B. C. Guldin, his heirs, executors, administrators or assigns of the assessment against I. L. Phillips as transferee of the assets of the Coombe Garment Company, in time to make a defense thereto, and (3) that it was not averred in the amended bill of complaint that B. C. Guldin or his heirs, representatives or assigns had agreed to pay any part of the said assessment, or any of the costs, expenses or fees of the litigation by which the said assessment was registered. The other defendants did not enter any appearance or file any pleading and they are in default.

3. The said motion to dismiss the amended bill of complaint was argued before Honorable O. B. Dickinson on March 20, 1936, and under date of April 16, 1936, an opinion

was filed in which the motion to dismiss was treated as a demurrer and in which the conclusion was reached that there was no equity in the bill and that it should be dismissed. The [fol. 34] said opinion stated that since there was no equity in the bill, it was not necessary to discuss the special grounds of the demurrer.

4. It is apparent from the said opinion that this Court, in reaching its conclusion that there was no equity in the bill, took the ground that plaintiff could have compelled the United States to assess all of the stockholders in the corporation. The language used by this Court in its opinion is as follows: "It may be and doubtless is true that he (i. e. decedent Phillips) might have demanded that the tax be assessed against all. If it had been, each would have been liable in solido for the whole up to what he had received from the corporation. If one had under compulsion paid the whole tax he could have forced contribution from the others."

Petitioners respectfully submit that this Court proceeded upon a misconception of the law. The United States Supreme Court, when it sustained the assessment against decedent Phillips, clearly stated that it was not open to him under the summary proceeding provided for by Section 280 of the Revenue Act of 1916 to bring in the other stockholders. The opinion of the Supreme Court was written by Mr. Justice Brandeis, who said (Phillips v. Commissioner, 283 U. S. 589, at p. 603):

"Such rule of convenience (i. e., bringing in other stockholders or transferees by a cross bill) is not applicable in summary administrative proceedings like that provided by sec. 280 (a) (1)."

It is submitted that this Court failed to distinguish between the remedy that was open to said I. L. Phillips in an equity proceeding and the absence of that remedy in the summary proceeding whereby the Government compelled the [fol. 35] payment of the tax in this case. The Supreme Court went on to say at pages 603-604:

"One who receives corporate assets upon dissolution is severally liable, to the extent of assets received, for the payment of taxes of the corporation; and other stockholders or transferees need not be joined. Non-joinder cannot

affect or diminish the several liability of the stockholder or transferee sued. Compare Benton v. American National Bank, 276 Fed. 368. The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders. There is nothing in sec. 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided."

It is obvious that this Court did not realize that the summary proceeding invoked by the United States deprived Phillips of the right to bring in the other stockholders by cross bill. The effect of the decision of the United States Supreme Court is that a transferee who is assessed must pay and must thereafter pursue his remedy against the other stockholders for contribution. That is precisely what has been done in this case.

5. This Court in its opinion stated that this case was analogous to that of joint tort feasors among whom at common law there was no equity of contribution. Therefore, this Court concluded that there was no equity of contribution among stockholders, to whom all of the assets of a corporation have been distributed, when one of those stock- [fol. 36] holders was compelled to pay a tax owing by the corporation for which all stockholders were ratably liable. It is respectfully submitted that there is an equity of contribution among stockholders in such a case. It has been so held by the Second Circuit Court of Appeals in the very litigation out of which this case arises: Phillips v. Commissioner of Internal Revenue, 42 F. (2d) 177. Judge Swan, who delivered the opinion of the Court in that case, said at page 180:

"There remains the question of the extent of the appellants' liability. They contend that it is limited to their decedent's pro rata share of the corporation's tax, while the Commissioner contends that each stockholder is severally liable up to the amount of the liquidating dividend he

received. The Commissioner's contention is correct. Bartlett v. Drew, 57 N. Y. 587, is precisely in point. This was an action in the nature of a creditor's bill brought by a judgment creditor of a New Jersey corporation, after the return of an execution unsatisfied, to reach money distributed by the corporation to Drew, a large stockholder and a resident of New York. Drew contended that the suit could not be maintained against him alone, but all stockholders must be brought in to the end that each might contribute his proportion to the payment of the plaintiff's debt. The court rejected this contention, saying:

"* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation have been discharged, if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equi- [fol. 37] table contribution; but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities, that may exist between his debtors.' Page 589 of 57 N. Y."

6. This Court in its opinion stated: "It is not explained why Max Phillips was not made a defendant unless the name suggests the reason, or more probably making him a defendant would have ousted this Court of jurisdiction of the cause." In making that statement it is submitted that this Court overlooked the averments of paragraph 17 of the amended bill of complaint. It is there set forth that the stock of the Coombe Garment Company held in the name of I. L. Phillips and Max Phillips, respectively, at the time of its liquidation in 1919, was wholly owned by plaintiff, Phillips-Jones Corporation, and that the liquidating dividends received by said I. L. Phillips and Max Phillips were forthwith paid over by them to plaintiff, Phillips-Jones Corporation, which was the real owner of the stock held in those two names. Those averments make it clear that Max Phillips was under no obligation to plaintiffs because he had paid over to plaintiff, Phillips-Jones Corporation, the full amount of the liquidating dividend received by him immediately upon its receipt.

7. This Court treated the motion to dismiss filed by only one of the eight defendants as a demurrer, although Federal Equity Rule No. 29 abolishes demurrers. Under said Equity Rule 29, the only matters before the Court were the specific points of law raised by the motion to dismiss as they affected the one defendant filing the said motion. The grounds upon which this Court proceeded in its opinion were different from the points of law which were raised in the said motion to dismiss. By deciding the case upon [fol. 38] grounds not raised by any party the Court deprived the plaintiffs of a proper opportunity to be heard thereon.

8. Certain facts that would have been developed upon a hearing of this cause were treated by the Court as nonexistent. Thus, the opinion states: "No explanation appears of why the assessment was made against Phillips alone."

The facts are that the United States had made a demand upon all of the stockholders as early as 1925 or 1926, so that they were then all informed that the United States Government claimed that the said tax was due by the corporation and that the stockholders were liable to see that the United States was paid. However, none of the stockholders did pay. The simplest procedure for the United States was to proceed against the only stockholder receiving a large enough distribution to permit recovery of the entire amount from him, and the Government so proceeded. During the course of the litigation between the Government and the executors of I. L. Phillips, deceased, the latter communicated with the other stockholders and said stockholders had opportunity to participate in the litigation with the Government but were content not to do so.

The matters referred to in this paragraph of the petition would have been developed upon a hearing of the cause. We bring them to the attention of this Court in case the misunderstanding thereof, as indicated by language in the opinion filed, may have influenced the Court in reaching its conclusion.

Wherefore petitioners are aggrieved by the conclusion reached in the said opinion filed and pray for a rule to show cause why a rehearing of the cause should not be had so that the said matters may be fully presented and a decision

[fol. 39] arrived at in accordance with the law as laid down in the early litigation in this very case and in accordance with the facts thereof.

Ulric J. Mengert, Montgomery & McCracken, Attorneys for Plaintiffs. Louis J. Trenhaft.

Duly sworn to by Louis J. Trenhaft. Jurat omitted in printing.

[fol. 40] IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE—Filed May 11, 1936

And Now, this eleventh day of May, A. D. 1936, upon consideration of the foregoing petition of plaintiffs for a rehearing and upon motion of Ulric J. Mengert, of counsel for plaintiffs, a rule is entered upon the defendants to show cause why a rehearing of this case should not be had. Rule returnable the twenty-fourth day of June, 1936, at 10 o'clock A. M. D. S. T.

Upon the return of this rule counsel has leave to rediscuss the merits of the case.

By the Court.

(Sgd.) Dickinson, J.

IN UNITED STATES DISTRICT COURT

ANSWER OF MARGARET WILKINSON, ADMINISTRATRIX D. B. N. C. T. A. OF THE ESTATE OF B. C. GULDIN, DECEASED, ONE OF THE DEFENDANTS ABOVE NAMED, TO THE RULE ENTERED MAY 11, 1936, RETURNABLE JUNE 24, 1936, TO SHOW CAUSE WHY A REHEARING SHOULD NOT BE HAD—Filed June 24, 1936

To the Honorable O. B. Dickinson, Judge of the United States District Court for the Eastern District of Pennsylvania:

Your respondent, Margaret Wilkinson, administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, one of the defendants above named, reserving to herself the benefit of all manner of objections and exceptions, respectfully prays that the petition filed by the plaintiffs to show

cause why a rehearing should not be had, be dismissed and [fol. 41] the said rule entered thereon discharged, for the following reasons:

1. On April 16, 1936, an opinion was filed by your Honorable Court in which the motion of this respondent to dismiss plaintiffs' amended bill of complaint was allowed, and decreed that the said amended bill of complaint should be dismissed.

Said motion to dismiss plaintiffs' amended bill of complaint was based solely upon matters appearing upon the face of the record, in effect a demurrer to plaintiffs' bill and the issue was so confined, and the merits of plaintiffs' bill accordingly and consequently not before the Court nor a subject for the Court's consideration.

In the instant rule entered by the plaintiffs, the plaintiffs attempt therein and thereby to involve the merits of the case, a subject which was not and is not before the Court, as an inspection of the record will show.

Wherefore, there is no authority in law nor precedent for plaintiffs' instant rule to discuss the merits of the case, and the same should, therefore, be discharged.

2. The instant petition filed by the plaintiffs in this case does not disclose any error made by your Honorable Court in the decree dismissing plaintiffs' bill. Plaintiffs aver, inter alia (paragraph 7), "The grounds upon which this Court proceeded in its opinion were different from the points of law which were raised in the said motion to dismiss."

Your respondent avers that it is not material whether the Court based its decree upon the grounds mentioned in your respondent's motion to dismiss or upon other grounds. It is the plaintiffs' burden to show that the decree of the Court is not good.

[fol. 42] Wherefore, plaintiffs' petition and rule should be respectively dismissed and discharged.

3. Oral argument was had before your Honorable Court on the said motion to dismiss plaintiffs' amended bill, briefs duly filed by the petitioners and this respondent, during which time each of the contending parties had a full opportunity to be heard, and on April 16, 1936, your Honorable Court filed its opinion and decreed that the said motion to

dismiss should be allowed and plaintiffs' bill be dismissed.

An inspection of plaintiffs' petition will show, as recourse being had thereto will appear, that there is no averment that plaintiffs had no opportunity of presenting the alleged grounds contained in their said petition to the Court for the Court's consideration prior to the entering of its decree, nor is there any averment that the alleged grounds mentioned in plaintiffs' said petition were discovered after the entering of the said decree.

Wherefore, plaintiffs' petition should be dismissed and the rule discharged.

Margaret Wilkinson, Admx. d. b. n. c. t. a. of B. C. Guldin, by P. B. Roads, Her Attorney-in-fact.

[fol. 43] *Duly sworn to by P. B. Roads.. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION FOR REARGUMENT—Filed July 7, 1936

Argued June 24, 1936

DICKINSON, J.:

July 6, 1936.

Leave was granted to file Supplemental Briefs. One on behalf of defendants has been delayed because of the illness of counsel. Inasmuch as the conclusion reached is in favor of the defendants, we see no reason to further withhold a ruling.

[fol. 44] We disposed of the motion to dismiss in the opinion filed. Nothing more is now called for than to state the conclusion reached that the motion for a re-argument be denied. The high opinion we have of the views of the experienced counsel for the plaintiff however induces us to depart from the usual course and to further discuss the merits of the Bill.

The petition for the re-argument so well summarizes the points made that we follow it.

1. The motion to dismiss includes what are really matters of defense. Because of this we did not discuss them. The motion however interposes what is really a demurrer to the Bill by raising the question of whether the Bill discloses

a cause of action cognizable in Equity. To this we limited the discussion. If the Bill does aver such cause of action it should not have been dismissed.

2. The opinion filed commented on the fact that other stockholders than Phillips might have been called upon to defend to the assessment against him. We expressed no opinion that the United States had no right to do what the Supreme Court has ruled it might do. The part of the opinion quoted in Paragraph 4 of the petition had a wholly different meaning than that ascribed to it. It was intended to emphasize that the obligation of a stockholder to pay the tax arose out of the assessment against him. If it had been assessed against all and one had paid contribution could have been enforced. The tax was not assessed against the defendants in this Bill and hence that ground for contribution does not exist. The plaintiff might, we still assume, have given notice of the proceeding against him for the tax and called upon the other stockholders to come in and defend or otherwise to contribute. This might or might not have been a ground for a demand for contribution. All the quoted part of the opinion means that this ground, good or bad, did not exist.

[fol. 45] 3. The analogue of tort feasors carries no such thought as that imputed to it. All which was meant was that there is not only a distinction but a difference between what may be thought to be what a party ought to do in the ethical sense and what he is bound to do by Law or Equity. It may be that these defendants "ought" to share the burden which plaintiff has carried but no Court can compel them to contribute unless they are under a legal or equitable obligation to do so.

4. We attach no importance to the averments of Paragraph 17 of the Bill. They are said to give precisely the same reasons for the omission to name Max Phillips which we assumed to exist. Whether we get them from Paragraph 17 or inferred them from the family name, we do not see makes any difference.

5. It is true that Equity Rule 29 "abolishes" demurrers. It is however also true that a Bill may be dismissed if it fails to disclose a cause of action. It is likewise true that such a motion raises a demurrer question and is in effect a demurrer. The motion to dismiss gave this ground among

others. We think the Court could dismiss the Bill on this ground alone.

6. We used the expression that no explanation of the assessment being against Phillips alone appeared. No one would hesitate to hazard a guess at the reasons for it. We do not see that this bears upon the ruling made.

7. We can understand that any one might think that all stockholders should contribute proportionately to the payment of this tax. We can enter into the feelings of the plaintiff that selecting Phillips from among all the stockholders and requiring him to pay the whole tax was an arbitrary and unjust act. The injustice of it however did not prevent the exaction from being made. The thought [fol. 46] that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay.

The motion for a re-argument is denied.

IN UNITED STATES DISTRICT COURT

DECREE—Filed July 27, 1936

And Now, July 27, 1936, this cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, namely: the amended bill of complaint herein shall be and the same is hereby dismissed for want of equity, with prejudice, and the defendants shall go hence hereof without day.

By the Court.

(Sgd.) Dickinson, J.

[fol. 47] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 27, 1936

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

Your petitioners, Phillips-Jones Corporation, individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, who are plaintiffs in the above-entitled cause, pray that they may be permitted to take an appeal from the decree entered in the above cause on the — day of July, 1936, to the United States Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignment of errors which is filed herewith, that a citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Third Circuit in accordance with the rules thereof.

Dated July 27, 1936.

Ulric J. Mengert, Attorney for Petitioners.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDERS ALLOWING APPEAL—Filed July 27, 1936

Before Dickinson, J.

And Now, July 27, 1936, on motion of counsel for Phillips-Jones Corporation, individually and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, it is

Ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit, from the decree entered herein on July 27, 1936, be and the same hereby is allowed, and it is further

Ordered that the bond on appeal be fixed at the sum of $250, and it is further

Ordered that a certified transcript of the record and proceedings upon which the decree appealed from was entered be transmitted to the United States Circuit Court of Appeals in accordance with the rules of court.

By the Court.

Dickinson, J.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed July 27, 1936

Come now Phillips-Jones Corporation, individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving executors under the will of I. L. Phillips, deceased, plaintiffs in the above-entitled cause, and file the following assignment of errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the decree of this Court entered on the twenty-seventh day of July, 1936.

[fol. 49] 1. The Court erred in that part of its opinion filed April 16, 1936, which reads as follows:

"The legal liability rests solely upon the assessment. Phillips was bound to pay the tax because it was assessed against him. No tax was assessed against the defendants and hence none of them were legally bound to pay."

2. The Court erred in that part of its opinon filed July 6, 1936, which reads as follows:

"The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay."

3. The Court erred in directing that the amended bill of complaint should be dismissed for want of equity.

4. The Court erred in not denying the motion to dismiss the amended bill of complaint filed by defendant, Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the estate of B. C. Guldin, deceased.

5. The Court erred in entering the following decree:

"And Now, July 27, 1936, this cause came on to be heard at this term and was argued by counsel and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, namely: The Amended Bill of Complaint herein shall be and the same is hereby dismissed for want of equity, with prejudice, and the defendants shall go hence hereof without delay."

Wherefore plaintiffs pray that the said decree may be reversed and for such other and further relief as to the Court may seem just and proper.

Ulric J. Mengert, Attorney for Plaintiffs.

Dated July 27, 1936.

[fol. 50] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed August 15, 1936

To the Clerk of the Above Court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Third Circuit, pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other, papers and exhibits, to wit:

1. Docket entries.
2. Amended bill of complaint.
3. Answer of C. S. Parmley to amended bill of complaint.
4. Answer of E. E. Scott to amended bill of complaint.
5. Motion of Margaret Wilkinson, Administratrix, etc., to dismiss amended bill.
6. Opinion dismissing bill of complaint for want of equity.
7. Petition of plaintiffs for rehearing and order of Court granting rule to show cause thereon.
8. Answer of Margaret Wilkinson, Administratrix, etc., to petition for rehearing.

9. Opinion denying motion for reargument.
10. Decree dismissing bill of complaint.
11. Petition for appeal.
12. Assignment of errors.

[fol. 51] 13. Decree granting appeal.

14. Præcipe for transcript of record and acknowledgment, and return of service thereof.
15. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Third Circuit and to be filed in the office of the clerk of the Appellate Court on or before the fifth day of September, 1936.

Ulric J. Mengert, Attorney for Plaintiffs.

Dated August 15, 1936.

[fol. 52] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6216

[Title omitted]

REFERENCE TO ARGUMENT

And afterwards, to wit, the first day of December, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the second day of March, 1937, come the parties aforesaid by their counsel aforesaid, and

the Court, now being fully advised in the premises, renders the following decision:

[fol. 54] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6216

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, Seymour J. Phillips and Abraham S. Phillips, Surviving Executors under the Will of I. L. Phillips, Deceased, Plaintiffs-Appellants,

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. Coombe, Roy Updegrave, Alvaretta Updegrave, Administratrix of the Estate of R. R. Updegrave, Deceased, and Margaret Wilkinson, Administratrix, d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased, Defendants-Appellees

Upon Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Davis and Thompson, Circuit Judges

OPINION—Filed March 2, 1937

THOMPSON, J.:

This is an appeal from a decree of the District Court for [fol. 55] the Eastern District of Pennsylvania dismissing an amended bill of complaint in which the appellants prayed for a decree against the several appellees directing them to contribute their pro rata shares of a judgment collected from the appellants. The facts leading up to this suit are stated by Mr. Justice Brandeis in Phillips v. Commissioner, 283 U. S. 589, 591 as follows:

"In 1919, the Coombe Garment Company, a Pennsylvania corporation, distributed all of its assets among its stockholders, and then dissolved. Thereafter, the Commissioner of Internal Revenue made deficiency assessments against it for income and profits taxes for the years 1918 and 1919. A small part of these assessments was collected leaving an unpaid balance $9,306.36. I. L. Phillips of New York City,

had owned one-fourth of the company's stock and had received $17,139.61 as his distributive dividend. Pursuant to Section 280 (a) (1) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 61, the Commissioner sent due notice that he proposed to assess against, and collect from, Phillips the entire remaining amount of the deficiencies. No notice of such deficiencies was sent to any of the other transferees, and no suit or proceedings for collection was instituted against them."

The Supreme Court sustained the right of the Commissioner to collect the entire deficiency through summary proceedings from Phillips alone. It did not, however, rule upon the right of Phillips to obtain contributions from the other stockholders. That is the question before us.

The right to contribution is of necessity dependent upon a prior determination that the appellees are liable for the corporation deficiency tax. It was unsuccessfully argued to the Supreme Court that Phillips should not be solely liable for the entire sum of the deficiency. The inequity to Phillips is not without justification. The decisions pro- [fol. 56] vide that the Commissioner may assess a tax in the summary fashion provided for by the 1926 Act; by a bill in equity, as in Leighton v. United States, 289 U. S. 506; or by an action at law, as in the cases cited in note 2 in Phillips v. Commissioner, supra. Phillips had the right to contest, and his executors did, in fact, contest the assessment before the Board of Tax Appeals, the Circuit Court of Appeals and the Supreme Court, with the Commissioner at all times a party litigant. Phillips' executors would have had an opportunity to contest had the Commissioner initiated proceedings against them by a bill in equity or by an action at law. The contentions of the appellants, however, if sustained, would deprive the appellees of a similar right. Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a

decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established.

The decree of the District Court dismissing the bill in equity is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 57] In United States Circuit Court of Appeals for the Third Circuit, October Term, 1936

No. 6216

Phillips-Jones Corp. et al., Appellants,

v.

C. S. Parmley et al., Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

Judgment—Filed March 2, 1937

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, March 2, 1937.

J. W. Thompson, Circuit Judge.

[fol. 58] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 59] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,503. U. S. Circuit Court of Appeals, Third Circuit. Term No. 45. Phillips-Jones Corporation, Individually, and Annie G. Phillips, et al, petitioners, vs. C. S. Parmley, C. H. Parnell, Effie E. Scott, et al. Petition for a writ of certiorari and exhibit thereto. Filed May 7, 1937. Term No. 45, O. T., 1937.

FILE COPY

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MAY 7 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. [redacted] 45

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, SEYMOUR J. PHILLIPS and ABRAHAM S. PHILLIPS, Surviving Executors Under the Will of I. L. PHILLIPS, Deceased, *Petitioners,*

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. COOMBE, ROY UPDEGRAVE, ALVARETTA UPDEGRAVE, Administratrix of the Estate of R. R. UPDEGRAVE, Deceased, and MARGARET WILKINSON, Administratrix, d. b. n. c. t. a. of the Estate of B. C. GULDIN, Deceased, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HERMAN GOLDMAN,
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Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No.

Phillips-Jones Corporation, Individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, Surviving Executors Under the Will of I. L. Phillips, Deceased,

Petitioners,

v.

C. S. Parmley, C. H. Parnell, Effie E. Scott, I. A. Coombe, T. H. Coombe, Roy Updegrave, Alvaretta Updegrave, Administratrix of the Estate of R. R. Updegrave, Deceased, and Margaret Wilkinson, Administratrix, d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners above named pray that a writ of certiorari issue to review the judgment and decree

of the Circuit Court of Appeals for the Third Circuit entered in the above entitled matter on March 2, 1937 (Rec. p. 57), which judgment affirmed the decree of the District Court for the Eastern District of Pennsylvania dismissing petitioners' amended bill of complaint in equity (Rec. p. 46).

QUESTION PRESENTED.

1. Where a corporation has liquidated and distributed its assets ratably among its stockholders, is one of such stockholders who has subsequently been obliged to pay in full deficiency income and profits taxes of the corporation, entitled to contribution from the other stockholders?

STATEMENT OF THE CASE.

In 1919 a corporation known as The Coombe Garment Company, a Pennsylvania corporation, wound up its affairs and distributed its assets ratably among its stockholders in proportion to their holdings (Rec. p. 7).

In 1924 and 1925 the Commissioner of Internal Revenue assessed against The Coombe Garment Company additional income and profits taxes for the years 1918 and 1919 in the total sum of $9,402.43 (Rec. p. 8). The corporation, which had no assets left, paid only a few dollars of this tax. In 1926 the Commissioner of Internal Revenue, pursuant to Section 280 of the Revenue Act of 1926, proposed an assessment against

I. L. Phillips, one of the principal stockholders of the company, for the **full amount** of the unpaid taxes (Rec. p. 9).

The executors of I. L. Phillips, who had died, vigorously fought the tax claim on the grounds, first, that the tax was not due from the corporation, second, that Section 280 of the Revenue Act of 1926 was unconstitutional and, third, that I. L. Phillips was only liable in proportion to his stock holdings. The matter finally came before this Court and was decided adversely to the executors (Rec. p. 9). This case is reported as:

> *Phillips, et al, Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589.*

After this decision the Phillips-Jones Corporation, which was the real owner of the stock standing in Phillips' name, paid the taxes with interest and costs and also paid the legal fees incident to the prosecution of the case (Rec. pp. 9, 10). Phillips' executors and the Phillips-Jones Corporation then brought the present bill in equity against other stockholders of the corporation seeking contribution from them in proportion to their holdings.

A motion to dismiss the bill for want of equity was filed (Rec. pp. 25-27) and on April 16, 1936, the District Court for the Eastern District of Pennsylvania dismissed the bill on the ground that liability for the taxes arose solely from assessment under Section 280 of the Revenue Act of 1926 and that the

respondent stockholders had never been assessed for the taxes, and were not liable in any way, therefore, and accordingly were not liable to contribute to Phillips and Phillips-Jones Corporation in relief of the obligation imposed upon them (Rec. pp. 28-32).

Petitioners sought a rehearing in the District Court for the Eastern District of Pennsylvania (Rec. pp. 32-39) and the court reaffirmed its position (Rec. pp. 43-46). From the decrees dismissing the bill (Rec. p. 46) your petitioners appealed to the Circuit Court of Appeals for the Third Circuit and the latter, on March 2, 1937, affirmed the judgment and decree of the District Court (Rec. p. 57). As we understand the Circuit Court's opinion, it holds; first, that no liability for the taxes existed until assessment under Section 280 of the Revenue Act of 1926; and, as the respondent stockholders were never assessed, they were not liable for the taxes and could not be compelled to contribute therefor; second, that to force these stockholders to contribute would constitute a new method for imposing tax liability not provided by the Revenue Act; third, that contribution could not be enforced against stockholders severally liable for taxes unless they were assessed with the amount thereof or were adjudged liable by formal judicial proceedings at the instance of the Commissioner.

Your petitioners now seek review of this final decree dismissing the bill and denying petitioners' right to contribution.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation, was not entitled to contribution from other stockholders.

2. In holding that stockholders of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) were not liable in contribution for deficiency income and profits taxes of the corporation until assessment therefor had been made against them by the Commissioner of Internal Revenue.

3. In holding that to permit one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation to obtain contribution from the other stockholders, would constitute an unwarranted judicial extension of the methods prescribed by Congress for imposing tax liability.

4. In holding that one stockholder of a liquidated corporation (whose assets had been distributed ratably

among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation could not compel the other stockholders to contribute unless their liability for the taxes had previously been established by judicial proceedings at the instance of the Commissioner in the courts or under Section 280 of the Revenue Act of 1926.

5. In holding that petitioners' bill seeking contribution should be dismissed in the following language:

> "The decree of the District Court dismissing the bill in equity is affirmed." (Rec. p. 56.)

and by the following decree:

> "* * * it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs." (Rec. p. 57.)

REASONS FOR GRANTING THE WRIT.

We submit the following reasons for the granting of review in the present case:

1. The decision of the Circuit Court of Appeals in this case denying the right of one stockholder, who has been obliged to pay in full the deficiency

income and profits taxes of a liquidated corporation, the right to compel contribution from the other stockholders, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in:

> *Phillips, et al.* v. *Commissioner of Internal Revenue, 42 Fed. (2d) 177.*

This decision was rendered in the collateral proceedings which sought to impose liability in full on one stockholder, Phillips. The Circuit Court of Appeals held that full liability could be imposed on Phillips and further held that this would be no hardship on him because he could compel contribution from the remaining stockholders. The present case is in direct conflict with the latter holding.

2. The decision of the Circuit Court of Appeals denying the right of contribution as just set forth is also in probable conflict with the decision of this Court in:

> *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589.*

This decision affirmed the decision of the Second Circuit Court of Appeals just set forth above. While it did not expressly undertake to pass upon the right of contribution, we believe that the decision imposing full liability on one stockholder, Phillips, was based upon the assumption that Phillips had the right to compel contribution from respondent stockholders.

3. The decision of the Circuit Court of Appeals denying the right to contribution was based upon the proposition that liability for such taxes was based solely upon the provisions of Section 280 of the Revenue Act of 1926 and that, until assessment under that section, the stockholders of the corporation were not liable for the corporation's taxes and that, therefore, they could not be compelled to contribute. The decision in this respect is in conflict with the decisions of this Court in:

> *Phillips, et al, Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,*

and

> *Leighton* v. *United States, 289 U. S. 506.*

It is also in conflict with the decisions of other Circuit Courts of Appeal in the following, among other cases:

> *Hatch* v. *Morosco Holding Co., 50 Fed. (2d) 138 (C. C. A. 2);*
> *Liquidators of Exchange Nat. Bank of Shreveport* v. *United States, 65 Fed. (2d) 316 (C. C. A. 5).*

All these decisions recognize that Section 280 of the Revenue Act of 1926 did not impose any new liability upon stockholders but that it merely provided a new method for collecting taxes. Liability according to these cases arises from the distribution of corporate assets without paying debts and not by assessment under the Revenue Act.

4. The decision of the Circuit Court of Appeals denying the right to contribution was further based upon the proposition that one of a group of severally liable stockholders who has been obliged to pay in full a corporate obligation, cannot obtain contribution from the other stockholders unless their liability for the corporate obligation has been previously established by judicial proceedings or a substitute therefor.

The decision in this respect is subversive of the whole doctrine of contribution and is in direct conflict with the decision of this Court in:

Hatch v. *Dana, 101 U. S. 205.*

5. Quite apart from any question of conflict, we believe this Court should grant review in the present case in order to supplement its decision in:

Phillips, et al, Executors v. *Commissioner of Internal Revenue, 283 U. S. 589,*

and complete its determination of the legal rights and liabilities of the parties interested and involved in The Coombe Garment Company tax situation.

We believe this is particularly appropriate because the case of *Phillips, et al, Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,* is the leading case under Section 280 of the Revenue Act of 1926. The doctrine of that case has frequently been invoked by the Commissioner of Internal Revenue to impose full liability upon one of a group of stockholders of a liquidated corporation. We can, therefore, reasonably anticipate numerous future cases involving the

same problem. Moreover, the question involved will no doubt frequently arise in the not distant future since Section 280 of the Revenue Act of 1926 has been reenacted without change as a part of the Revenue Act of 1936 (Act of June 22, 1936, Chap. 690, Section 311, 49 Stat. 1729).

WHEREFORE, petitioners pray that this Court may issue its writ of certiorari to review the decision of the Court below.

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, SEYMOUR J. PHILLIPS and ABRAHAM S. PHILLIPS, Surviving Executors Under the Will of I. L. PHILLIPS, Deceased,

By

HERMAN GOLDMAN,

ROBERT T. McCRACKEN,

Their Attorneys.

BRIEF IN SUPPORT OF PETITION.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania filed April 16, 1936, is printed at Record, page 28, and is not reported.

The opinion of the District Court for the Eastern District of Pennsylvania Sur Motion for Re-argument filed July 7, 1936, is printed at Record, page 43, and is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit filed March 2, 1937, is printed at Record, page 54, and is not yet reported.

The opinion of the Supreme Court of the United States filed May 25, 1931, in the correlated case of *Phillips, et al, Executors* v. *Commissioner of Internal Revenue*, is reported in *283 U. S. 589.*

The opinion of the Circuit Court of Appeals for the Second Circuit filed June 9, 1930, in the same matter, is reported in *42 Fed. (2d) 177.*

JURISDICTION.

The final decision of the Circuit Court of Appeals of the Third Circuit was rendered March 2, 1937.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936.

OUTLINE OF ARGUMENT.

In this brief we confine ourselves strictly to a presentation of the reasons why this Court should grant certiorari. We submit and discuss primarily the following points:

1. The denial of the right to contribution in the present case results in imposing on one stockholder of a liquidated corporation who has been compelled to pay deficiency income and profits taxes of the corporation by proceedings under Section 280 of the Revenue Act of 1926, the full burden of the liquidated corporation's tax liability. It bars the only means such stockholder has to make other stockholders bear their fair share of the burden.

2. The denial of the right to contribution in the present case is inconsistent with the previous decisions on this very point rendered in the proceedings by the Commissioner of Internal Revenue against Phillips alone.

3. The denial of the right to contribution is based on a fundamental misconception of Section 280 of the Revenue Act of 1926. That section provides merely a new method for enforcing the stockholders' pre-existing liability. It does not impose any new liability. A misconstruction of the statute in this respect has led to the present error and may well lead to other errors.

4. The denial of the right to contribution is based on a fundamental misunderstanding of the doctrine of contribution. It, in effect, restricts the doctrine to cases between parties adjudged liable for the same obligation. The doctrine is broader than this and was designed to permit the adjustment of equities between parties liable for the same obligation, regardless of whether they have been adjudged liable or not.

ARGUMENT.

1. The Denial of the Right to Contribution in the Present Case Results in Imposing on One Stockholder of a Liquidated Corporation who has been Compelled to Pay Deficiency Income and Profits Taxes of the Corporation by Proceedings Under Section 280 of the Revenue Act of 1926, the Full Burden of the Liquidated Corporation's Tax Liability.

We should like to emphasize at the outset the grave injustice of the present decision of the Circuit Court of Appeals. Under the decision of this Court in:

> *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,*

it was recognized that the Commissioner of Internal Revenue could proceed by assessment to collect the full amount of The Coombe Garment Company's taxes from one of the stockholders, namely, petitioner,

Phillips. It was also recognized that Phillips could not join the remaining stockholders in that proceeding and compel them to pay their fair share of the taxes (See 283 U. S. 589, 603). It was conceded by this Court that if the Commissioner of Internal Revenue had sought to collect the taxes from Phillips by a bill in equity, he could have joined the respondent stockholders and made them bear their fair share of the burden. This Court, however, held that such joinder could not be tolerated in a summary proceeding by assessment.

Phillips' executors were, accordingly, obliged to fight the assessment proceeding alone and were relegated to an independent action of contribution against the remaining stockholders. The decision of the Circuit Court of Appeals in the present case bars even this right. It, therefore, unequivocally holds that if the Commissioner of Internal Revenue proceeds against one stockholder under Section 280, that stockholder has no redress whatsoever against the other stockholders to compel them to pay their fair share of the taxes.

The manifest injustice of this decision is apparent. In fact, it was conceded both by the District Court and the Circuit Court of Appeals. (See opinion of the District Court, Rec. p. 30; see opinion of the Circuit Court of Appeals, Rec. p. 55.) The decision is also in conflict, we believe, with the law as established by the decisions of this Court and the Circuit Courts of Appeals for the other circuits.

2. The Denial of the Right to Contribution in the Present Case is Inconsistent with the Previous Decisions on this Very Point Rendered in the Proceedings by the Commissioner of Internal Revenue Against Phillips Alone.

The basic ruling of the Circuit Court of Appeals denying the right of contribution is in direct conflict with the prior decisions of this Court and the Circuit Court of Appeals for the Second Circuit in the proceedings against petitioner, Phillips.

When the case was in the Circuit Court of Appeals for the Second Circuit, it was urged that Phillips was only liable in proportion to his stock holdings. While the Court overruled this contention, it was, we believe, careful to point out that this was no hardship to Phillips since he could compel contribution from the other stockholders by an independent suit. The Court said, *page 180:*

> "* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., Sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation has been discharged, **if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution;** but with that proceeding the creditor has nothing to do, unless he

> chooses to intervene to settle equities that may exist between his debtors.' Page 589 of 57 N. Y.
>
> "'* * * The defendant, Drew, is found to be in possession of assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it." Page 591 of 57 N. Y." (Boldface ours.)

When this decision came before this Court, in *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,* it affirmed the decision of the Circuit Court of Appeals and said p. 604:

> "The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholder. There is nothing in Sec. 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided."

While this Court did not expressly pass on the contribution point, we very earnestly submit that its affirmance was based upon an assumption that Phillips could compel the other stockholders to bear their fair share of the corporation's tax liability by independent suit. This seems very apparent if this

Court's opinion is read in the light of the decision of the Circuit Court of Appeals.

The decision in this case is, therefore, we believe, clearly erroneous, and presents a conflict with the decisions just noted which should be resolved by this Court.

3. The Denial of the Right to Contribution is Based on a Fundamental Misconception of Section 280 of the Revenue Act of 1926. That Section Provides Merely a New Method for Enforcing the Stockholders' Preexisting Liability.

Not only is the ultimate ruling of the Court erroneous and conflicting, but an examination of the reasons assigned for the holding reveal further error and conflict. The Circuit Court of Appeals in this case proceeded on a fundamental misconception of Section 280 of the Revenue Act.

The pertinent portions of Section 280 read as follows:

> "(a) The amounts of the following liabilities shall * * * be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *
>
> "(1) The liability, at law or in equity, of a transferee of property of a taxpayer in respect of the tax * * * imposed upon the taxpayer by this chapter or by any prior income, excess profits or War Profits Tax Act."

It seems reasonably apparent that this section does not create liability. It has long been recognized that

when a business corporation winds up and distributes its assets among its stockholders they are, as a matter of general law, liable to unpaid corporate creditors to the extent of the assets received by them. This generally recognized liability is based upon the old doctrine that corporate assets are a trust fund for creditors. In this connection see:

Pierce v. *United States, 255 U. S. 398.*

The stockholders are liable for Federal taxes in the same manner and to the same extent as they are liable for other unpaid corporate debts. Section 280 does not add or subtract from that liability. It merely imposes a new method for enforcing that liability in tax cases (Phillips, *et al., v.* Commissioner, 283 U. S. 589, 594). Both the District Court and the Circuit Court of Appeals misunderstood this. They assumed that stockholders of a liquidated corporation were not as a matter of general law liable for its debts under any circumstances and then held that Section 280 created a new liability. This error is manifest from the following statements.

The District Court said *(Rec. p. 46):*

> "The thought that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay.

> Here there has been no assessment and hence there is no obligation to pay."

The Circuit Court of Appeals said *(Rec. p. 56)*:

> "Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability."

This holding that the stockholders of a liquidated corporation are rendered liable for corporate taxes solely because of assessment under Section 280, is at variance with practically every other case which has had occasion to construe that section. These cases recognize that Section 280 has merely created a new mode for enforcing a preexisting liability.

This was clearly indicated in the decision of:

Phillips, et al., Executors v. *Commissioner of Internal Revenue, 283 U. S. 589,*

and also in:

Leighton v. *United States, 289 U. S. 506.*

It has been repeatedly pointed out by other Circuit Courts of Appeal.

Hatch v. Morosco Holding Co., 50 Fed. (2d) 138 (C. C. A. 2).

Here the Circuit Court of Appeals for the Second Circuit said, *page 139:*

"The order appealed from allows the United States to prove as a claim against the receivership taxes assessed against Morosco Holding Company under section 280 of the Revenue Act of 1926 (44 Stat. 61 (26 USCA Sec. 1069)), the validity of which this court sustained in Phillips *v.* Commissioner, 42 F. (2d) 177, pending on certiorari in the Supreme Court, 51 S. Ct. 82, 75 L. Ed.—. That section imposes no new obligation upon the transferee of property of a taxpayer, but it permits collection from him, by a summary procedure, of taxes owed by the transferor, to the extent that the municipal law makes him liable at law or in equity for the transferor's taxes. See United States *v.* Updike, 281 U. S. 489, 493, 50 S. Ct. 367, 74 L. Ed. 984; Phillips *v.* Commissioner, *supra;* Wire Wheel Corp. *v.* Commissioner, 16 B. T. A. 737, affirmed by this court 46 F. (2d) 1013."

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Here the Circuit Court of Appeals for the Fifth Circuit said, *page 316:*

"This section 'provides the United States with a new remedy for enforcing the existing "liability, at law or in equity"' of a transferee. Phillips *v.* Comm., 283 U. S. 594, 51 S. Ct. 608, 610, 75 L. Ed. 1289. It does not create or impose an obligation not already fixed by municipal law. It merely provides a summary remedy for its direct enforcement. Phillips *v.* Comm. *supra.* Hatch *v.* Morosco Holding Co. (C. C. A.) 50 F. (2d) 138."

We believe the misconception of Section 280 is largely responsible for the error in the present case and may lead to great confusion in the future. A proper recognition that the liability of stockholders is dependent on general law renders a great body of decisions involving the rights of creditors of corporations applicable to tax matters. Numerous complicated questions which may arise can be adjusted in the light of these prior decisions. However, if Section 280 is construed as creating a new liability, this body of law is rendered inapplicable. The present case is but one example of the anomalous results which such an error will foster.

4. The Denial of the Right to Contribution is Based on a Fundamental Misunderstanding of the Doctrine of Contribution. It, in Effect, Restricts the Doctrine to Cases Between Parties Adjudged Liable for the Same Obligation.

While the misconstruction of Section 280 would seem to be primarily responsible for the decision in this case, the Circuit Court of Appeals also seems to suggest that, conceding all the stockholders were liable for the taxes under the trust fund theory, one stockholder who has been obliged to pay the taxes in full cannot force the other stockholders to contribute unless their liability for the taxes has previously been established in judicial proceedings instituted by the Commissioner of Internal Revenue. The Court said *(Rec. pp. 55, 56)*:

> "The right to contribution is of necessity dependent upon a prior determination that the appellees are liable for the corporation deficiency tax. * * * In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

In other words, they suggest that contribution can only be enforced to adjust equities among persons who have been adjudged liable for the same obligation. This would in most cases destroy the right of contribution. Let us take the simplest case and imagine that two debtors have signed a joint and several note for their obligation. Under such circumstances, the creditor is at liberty to enforce collection from either or both at his option. If the creditor elects to collect from one only by an action against him, this case holds that the other joint debtor cannot be compelled to contribute in relief of his co-obligor. It holds that one joint obligor cannot compel the other to contribute unless the latter has been adjudged liable for the joint obligation by a court of record. This is a most unfortunate holding.

The Circuit Court of Appeals seeks to justify the holding by suggesting that unless the liability of respondent stockholders has been established by a judicial proceeding, they will have no opportunity to assert their defenses in court. This is not so. The

remaining stockholders will have an opportunity to set up their defenses in the present action for contribution. They can defend this action on any fair ground and will have full opportunity to contest their liability and the amount thereof.

The decision in this respect is contrary to the well settled doctrine of contribution and contrary to the rulings of this Court. In this connection see:

Hatch v. *Dana, 101 U. S. 205.*

In this case a creditor of a corporation brought a bill in equity against some but not all of the stockholders of the corporation seeking to collect his debt out of the unpaid stock subscriptions of these stockholders. The stockholders joined contended that all the stockholders should be parties defendant. This contention was overruled by the lower Court which entered a judgment against the stockholders who were made parties for the full amount owed by them on their unpaid subscriptions. This amount was more than sufficient to satisfy the complainant's debt. When the case came before this Court it was again contended that all the stockholders should have been joined as defendants. This Court overruled the contention and pointed out that the creditor was not concerned with adjusting the equities between the stockholders. The Court went on to point out that if the stockholders who had been made parties to the bill had desired to do so, they could have brought a cross-bill joining all the other stockholders as parties

and compelled them to bear their fair share of the burden. It further held that even though the other stockholders had not been joined and adjudged liable, the defendant stockholders could compel contribution by a separate action. The Court said, *page 214:*

> "We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock subscriptions. **Their equitable right to contribution is not yet lost."** (Boldface ours.)

5. Conclusion.

In conclusion, we suggest again that it is particularly appropriate for this Court to grant review in order to supplement its decision in *Phillips, et al, Executors* v. *Commissioners of Internal Revenue, 283 U. S. 589.* We believe it would be appropriate for the Court to reconsider The Coombe Garment Company tax situation again and make final determination of the rights and liabilities of all parties interested. We believe this is particularly expedient because the previous decision of this Court is a leading one which has been frequently invoked by the government in similar situations. We also call the

Court's attention to the fact that the problem is a continuing one since Section 280 of the Revenue Act of 1926 has recently been reenacted without change in the Revenue Act of 1936 (Act of June 22, 1936, Chap. 690, Section 311, 49 Stat. 1729).

Respectfully submitted,

HERMAN GOLDMAN,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937. No. 45.

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, SEYMOUR J. PHILLIPS and ABRAHAM S. PHILLIPS, Surviving Executors Under the Will of I. L. PHILLIPS, Deceased, *Petitioners,*

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. COOMBE, ROY UPDEGRAVE, ALVARETTA UPDEGRAVE, Administratrix of the Estate of R. R. UPDEGRAVE, Deceased, and MARGARET WILKINSON, Administratrix, d. b. n. c. t. a. of the Estate of B. C. GULDIN, Deceased, *Respondents.*

BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937. No. 45.

Phillips-Jones Corporation, Individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, Surviving Executors Under the Will of I. L. Phillips, Deceased,

Petitioners,

v.

C. S. Parmley, C. H. Parnell, Effie E. Scott, I. A. Coombe, T. H. Coombe, Roy Updegrave, Alvaretta Updegrave, Administratrix of the Estate of R. R. Updegrave, Deceased, and Margaret Wilkinson, Administratrix, d. b. n. c. t. a. of the Estate of B. C. Guldin, Deceased,

Respondents.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania filed April 16, 1936, is printed at Record, page 18, and is not reported.

The opinion of the District Court for the Eastern District of Pennsylvania Sur Motion for Re-argument filed July 7, 1936, is printed at Record, page 29, and is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit filed March 2, 1937, is printed at Record, page 36, and is reported in 88 F (2d) 958.

The opinion of the Supreme Court of the United States filed May 25, 1931, in the correlated case of *Phillips, et al, Executors* v. *Commissioner of Internal Revenue,* is reported in *283 U. S. 589.*

The opinion of the Circuit Court of Appeals for the Second Circuit filed June 9, 1930, in the same matter, is reported in *42 Fed. (2d) 177.*

JURISDICTION.

The final decision of the Circuit Court of Appeals of the Third Circuit was rendered March 2, 1937.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by Act of Congress of February 13, 1925, Chapter 229, 43 Stat. 936.

STATEMENT OF THE CASE.

In 1919 a corporation known as The Coombe Garment Company, a Pennsylvania corporation, wound up its affairs and distributed its assets ratably among its stockholders in proportion to their holdings (R. 4).

In 1924 and 1925 the Commissioner of Internal Revenue assessed against The Coombe Garment Company additional income and profits taxes for years 1918 and 1919 in the total sum of $9,402.43 (R. 5). The corporation, which had no assets left, paid only a few dollars of this tax. In 1926 the Commissioner of Internal Revenue, pursuant to Section 280 of the Revenue Act of 1926, proposed an assessment against I. L. Phillips, one of the principal stockholders of the company, for the full amount of the unpaid taxes (R. 5).

The executors of I. L. Phillips, who had died, vigorously fought the tax claim on the grounds, first, that the tax was not due from the corporation, second, that Section 280 of the Revenue Act of 1926 was unconstitutional and, third, that I. L. Phillips was only liable in proportion to his stock holdings. The matter finally came before this Court and was decided adversely to the executors (R. 6). This case is reported as:

> *Phillips, et al, Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589.*

After this decision the Phillips-Jones Corporation, which was the real owner of the stock standing in Phillips' name, paid the taxes with interest and costs and also paid the legal fees incident to the prosecution of the case (R. 6). Phillips' executors and the Phillips-Jones Corporation then brought the present bill in equity against other stockholders of the cor-

poration seeking contribution from them in proportion to their holdings.

A motion to dismiss the bill for want of equity was filed (R. 17-18) and on April 16, 1936, the District Court for the Eastern District of Pennsylvania dismissed the bill on the ground that liability for the taxes arose solely from assessment under Section 280 of the Revenue Act of 1926 and that the respondent stockholders had never been assessed for the taxes, and were not liable in any way, therefore, and accordingly were not liable to contribute to Phillips and Phillips-Jones Corporation in relief of the obligation imposed upon them (R. 18-21).

Petitioners sought a rehearing in the District Court for the Eastern District of Pennsylvania (R. 22-27) and the court reaffirmed its position (R. 29-31). From the decree dismissing the bill (R. 31) your petitioners appealed to the Circuit Court of Appeals for the Third Circuit and the latter, on March 2, 1937, affirmed the judgment and decree of the District Court (R. 38). As we understand the Circuit Court's opinion, it holds; first, that no liability for the taxes existed until assessment under Section 280 of the Revenue Act of 1926; and, as the respondent stockholders were never assessed, they were not liable for the taxes and could not be compelled to contribute therefor; second, that to force these stockholders to contribute would constitute a new method for imposing tax liability not provided by the Revenue Act; third, that contribution could not be enforced against stockholders severally liable for taxes unless they

were assessed with the amount thereof or were adjudged liable by formal judicial proceedings at the instance of the Commissioner.

On June 1, 1937, this Court granted certiorari to review the decision of the Circuit Court of Appeals.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

1. In holding that one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation, was not entitled to contribution from other stockholders.

2. In holding that stockholders of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) were not liable in contribution for deficiency income and profits taxes of the corporation until assessment therefor had been made against them by the Commissioner of Internal Revenue.

3. In holding that to permit one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation to obtain contribution from the other stockholders,

would constitute an unwarranted judicial extension of the methods prescribed by Congress for imposing tax liability.

4. In holding that one stockholder of a liquidated corporation (whose assets had been distributed ratably among its stockholders in proportion to their holdings) who was obliged to pay in full deficiency income and profits taxes of the corporation could not compel the other stockholders to contribute unless their liability for the taxes had previously been established by judicial proceedings at the instance of the Commissioner in the courts or under Section 280 of the Revenue Act of 1926.

5. In holding that petitioners' bill seeking contribution should be dismissed in the following language:

> "The decree of the District Court dismissing the bill in equity is affirmed." (R. 38.)

and by the following decree:

> "* * * it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs." (R. 38.)

SUMMARY OF ARGUMENT.

1. The denial of the right to contribution in the present case results in imposing on one stockholder of a liquidated corporation who has been compelled

to pay deficiency income and profits taxes of the corporation by proceedings under Section 280 of the Revenue Act of 1926, the full burden of the liquidated corporation's tax liability. It bars the only means such stockholder has to make other stockholders bear their fair share of the burden.

2. The denial of the right to contribution in the present case is inconsistent with the previous decisions on this very point rendered in the proceedings by the Commissioner of Internal Revenue against Phillips alone.

3. The denial of the right to contribution is based on a fundamental misconception of Section 280 of the Revenue Act of 1926. That section provides merely a new method for enforcing the stockholders' pre-existing liability. It does not impose any new liability. A misconstruction of the statute in this respect has led to the present error and may well lead to other errors.

4. The denial of the right to contribution is based on a fundamental misunderstanding of the doctrine of contribution. It, in effect, restricts the doctrine to cases between parties adjudged liable for the same obligations. The doctrine is broader than this and was designed to permit the adjustment of equities between parties liable for the same obligation regardless of whether they have been adjudged liable or not.

ARGUMENT.

1. The Denial of the Right to Contribution in the Present Case Results in Imposing on One Stockholder of a Liquidated Corporation who has been Compelled to Pay Deficiency Income and Profits Taxes of the Corporation by Proceedings Under Section 280 of the Revenue Act of 1926, the Full Burden of the Liquidated Corporation's Tax Liability.

We should like to emphasize at the outset the grave injustice of the present decision of the Circuit Court of Appeals. Under the decision of this Court in:

> *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,*

it was recognized that the Commissioner of Internal Revenue could proceed by assessment to collect the full amount of The Coombe Garment Company's taxes from one of the stockholders, namely, petitioner, Phillips. It was also recognized that Phillips could not join and the Commissioner of Internal Revenue was not required to join the remaining stockholders in that proceeding and compel them to pay their fair share of the taxes (See 283 U. S. 589, 603). It was conceded by this Court that if the Commissioner of Internal Revenue had sought to collect the taxes from Phillips by a bill in equity, he could have joined the respondent stockholders and made them bear their fair share of the burden. This Court, however, held

that such joinder could not be tolerated in a summary proceeding by assessment.

Phillips' executors were, accordingly, obliged to fight the assessment proceeding alone and were relegated to an independent action of contribution against the remaining stockholders. The decision of the Circuit Court of Appeals in the present case bars even this right. It, therefore, unequivocally holds that if the Commissioner of Internal Revenue proceeds against one stockholder under Section 280, that stockholder has no redress whatsoever against the other stockholders to compel them to pay their fair share of the taxes.

The right to contribution is based upon the payment of a common burden which others are equally bound to bear.

Power v. *Rees, 189 Pa. 496;*
Friedman v. *Maltinsky, 260 Pa. 312.*

The denial of the right to contribution in this case imposes upon the stockholder who has paid the obligation of the corporation, the entire burden of an obligation for which he was liable only in common with all other stockholders.

The manifest injustice of this decision is apparent. In fact, it was conceded both by the District Court and the Circuit Court of Appeals. (See opinion of the District Court, R. 20; see opinion of the Circuit Court of Appeals, R. 37.) The decision is also in conflict, we believe, with the law as established by the decisions of this Court and the Circuit Courts of Appeals for the other circuits.

2. The Denial of the Right to Contribution in the Present Case is Inconsistent with the Previous Decisions on this Very Point Rendered in the Proceedings by the Commissioner of Internal Revenue Against Phillips Alone.

The basic ruling of the Circuit Court of Appeals denying the right of contribution is in direct conflict with the prior decisions of this Court and the Circuit Court of Appeals for the Second Circuit in the proceedings against petitioner, Phillips.

When the correlated case was in the Circuit Court of Appeals for the Second Circuit, it was urged that Phillips was only liable in proportion to his stock holdings. While the Court overruled this contention, it was, we believe, careful to point out that this was no hardship to Phillips since he could compel contribution from the other stockholders by an independent suit. The Court said, *Phillips* v. *Commissioner, 42 F (2d) 177, 180:*

> "'* * * It is a very plain proposition that the stock and property of every corporation is to be regarded as a trust fund for the payment of its debts, and its creditors have a lien and the right to priority of payment over any stockholder. (2 Story Eq. Jur., Sec. 1252.) Where stock and property has been divided between stockholders before all the debts of the corporation has been discharged, **if any one stockholder is compelled to pay more than his fair share of any unpaid debt he may resort to his associates for equitable contribution;** but with that proceeding the creditor has nothing to do, unless he chooses to intervene to settle equities that may exist between his debtors.' Page 589 of 57 N. Y.

> "'* * * The defendant, Drew, is found to be in possession of assets of the dissolved or insolvent corporation more than sufficient to pay the plaintiff her demand, and the law requires that he should pay it.'' Page 591 of 57 N. Y.'' (Boldface ours.)

When this decision came before this Court, in *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,* it affirmed the decision of the Circuit Court of Appeals and said p. 604:

> "The individual several liability of Phillips may be fully enforced by the United States in the present proceeding. Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholder. There is nothing in Sec. 280 to indicate that Congress intended to limit the procedure in this way. And any such requirement would seriously impair the efficiency of the summary method provided.''

While this Court did not expressly pass on the contribution point, we very earnestly submit that its affirmance was based upon an assumption that Phillips could compel the other stockholders to bear their fair share of the corporation's tax liability by independent suit. This seems very apparent if this Court's opinion is read in the light of the decision of the Circuit Court of Appeals.

The decision in this case is, therefore, we believe, clearly erroneous, because it is inconsistent with the decisions just noted.

3. The Denial of the Right to Contribution is Based on a Fundamental Misconception of Section 280 of the Revenue Act of 1926. That Section Provides Merely a New Method for Enforcing the Stockholders' Preexisting Liability.

Not only is the ultimate ruling of the Court below erroneous and conflicting, but an examination of the reasons assigned for the holding reveal further error and conflict. The Circuit Court of Appeals in this case proceeded on a fundamental misconception of Section 280 of the Revenue Act of 1926 (now Section 311 of the Revenue Act of 1936).

The pertinent portions of Section 280 read as follows:

> "(a) The amounts of the following liabilities shall * * * be assessed, collected and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title * * *
>
> "(1) The liability, at law or in equity, of a transferee of property of a taxpayer in respect of the tax * * * imposed upon the taxpayer by this chapter or by any prior income, excess profits or War Profits Tax Act."

It seems reasonably apparent that this section does not create liability. It has long been recognized that when a business corporation winds up and distributes its assets among its stockholders they are, as a matter

of general law, liable to unpaid corporate creditors to the extent of the assets received by them. This generally recognized liability is based upon the old doctrine that corporate assets are a trust fund for creditors. In this connection see:

Pierce v. United States, 255 U. S. 398.

The stockholders are liable for Federal taxes in the same manner and to the same extent as they are liable for other unpaid corporate debts. Section 280 did not add to or subtract from that liability. It merely imposed a new method for enforcing that liability in tax cases (Phillips, *et al. v.* Commissioner, 283 U. S. 589, 594). Both the District Court and the Circuit Court of Appeals misunderstood this. They assumed that stockholders of a liquidated corporation were not as a matter of general law liable for its debts under any circumstances and then held that Section 280 created a new liability. This error is manifest from the following statements.

The District Court said *(Rec. p. 31)*:

> "The thought that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay."

The Circuit Court of Appeals said *(Rec. p. 37)*:

> "Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commission prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability."

This holding that the stockholders of a liquidated corporation are rendered liable for corporate taxes solely because of assessment under Section 280, is at variance with practically every other case which has had occasion to construe that section. These cases recognize that Section 280 has merely created a new mode for enforcing a preexisting liability.

This was clearly indicated in the decision of:

> *Phillips, et al., Executors* v. *Commissioner of Internal Revenue, 283 U. S. 589,*

and also in:

> *Leighton v. United States, 289 U. S. 506.*

It has been repeatedly pointed out by other Circuit Courts of Appeal.

> *Hatch* v. *Morosco Holding Co., 50 Fed. (2d) 138 (C. C. A. 2).*

Here the Circuit Court of Appeals for the Second Circuit said, *page 139:*

"The order appealed from allows the United States to prove as a claim against the receivership taxes assessed against Morosco Holding Company under section 280 of the Revenue Act of 1926 (44 Stat. 61 (26 USCA Sec. 1069)), the validity of which this court sustained in Phillips *v.* Commissioner, 42 F. (2d) 177, pending on certiorari in the Supreme Court, 51 S. Ct. 82, 75 L. Ed.—. That section imposes no new obligation upon the transferee of property of a taxpayer, but it permits collection from him, by a summary procedure, of taxes owed by the transferor, to the extent that the municipal law makes him liable at law or in equity for the transferor's taxes. See United States *v.* Updike, 281 U. S. 489, 493, 50 S. Ct. 367, 74 L. Ed. 984; Phillips *v.* Commissioner, *supra;* Wire Wheel Corp. *v.* Commissioner, 16 B. T. A. 737, affirmed by this court 46 F. (2d) 1013."

Liquidators of Exchange Nat. Bank of Shreveport v. United States, 65 Fed. (2d) 316 (C. C. A. 5).

Here the Circuit Court of Appeals for the Fifth Circuit said, *page 316:*

"This section 'provides the United States with a new remedy for enforcing the existing "liability, at law or in equity"' of a transferee. Phillips *v.* Comm., 283 U. S. 594, 51 S. Ct. 608, 610, 75 L. Ed. 1289. It does not create or impose an obligation not already fixed by municipal law. It merely provides a summary remedy for its direct enforcement. Phillips *v.* Comm. *supra.* Hatch *v.* Morosco Holding Co. (C. C. A.) 50 F. (2d) 138."

We believe the misconception of Section 280 is largely responsible for the error in the present case and may lead to great confusion in the future. A proper recognition that the liability of stockholders is dependent on general law renders a great body of decisions involving the rights of creditors of corporations applicable to tax matters. Numerous complicated questions which may arise can be adjusted in the light of these prior decisions. However, if Section 280 is construed as creating a new liability, this body of law is rendered inapplicable. The present case is but one example of the anomalous results which such an error will foster.

4. The Denial of the Right to Contribution is Based on a Fundamental Misunderstanding of the Doctrine of Contribution. It, in Effect, Restricts the Doctrine to Cases Between Parties Adjudged Liable for the Same Obligation.

While the misconstruction of Section 280 would seem to be primarily responsible for the decision in this case, the Circuit Court of Appeals also seems to suggest that, conceding all the stockholders were liable for the taxes under the trust fund theory, one stockholder who has been obliged to pay the taxes in full cannot force the other stockholders to contribute unless their liability for the taxes has previously been established in judicial proceedings instituted by the Commissioner of Internal Revenue. The Court said *(Rec. p. 37)*:

> "The right to contribution is of necessity dependent upon a prior determination that the appelles are liable for the corporation deficiency tax. * * * In the absence of assessment against the several appelles by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

In other words, they suggest that contribution can only be enforced to adjust equities among persons who have been adjudged liable for the same obligation. This would in most cases destroy the right of contribution. Let us take the simplest case and imagaine that two debtors have signed a joint and several note for their obligation. Under such circumstances, the creditor is at liberty to enforce collection from either or both of his option. If the creditor elects to collect from one only by an action against him, this case holds that the other joint debtor cannot be compelled to contribute in relief of his co-obligor. It holds that one joint obligor cannot compel the other to contribute unless the latter has been adjudged liable for the joint obligation by a court of record. This is a most unfortunate holding.

The Circuit Court of Appeals seeks to justify the holding by suggesting that unless the liability of respondent stockholders has been established by a judicial proceeding, they will have no opportunity to assert their defenses in court. This is not so. The remaining stockholders will have an opportunity to

set up their defenses in the present action for contribution. They can defend this action on any fair ground and will have full opportunity to contest their liability and the amount thereof.

The decision in this respect is contrary to the well settled doctrine of contribution and contrary to the rulings of this Court. In this connection see:

Hatch v. *Dana, 101 U. S. 205.*

In this case a creditor of a corporation brought a bill in equity against some but not all of the stockholders of the corporation seeking to collect his debt out of the unpaid stock subscriptions of these stockholders. The stockholders joined contended that all the stockholders should be parties defendant. This contention was overruled by the lower Court which entered a judgment against the stockholders who were made parties for the full amount owed by them on their unpaid subscriptions. This amount was more than sufficient to satisfy the complainant's debt. When the case came before this Court it was again contended that all the stockholders should have been joined as defendants. This Court overruled the contention and pointed out that the creditor was not concerned with adjusting the equities between the stockholders. The Court went on to point out that if the stockholders who had been made parties to the bill had desired to do so, they could have brought a cross-bill joining all the other stockholders as parties and compelled them to bear their fair share of the

burden. It further held that even though the other stockholders had not been joined and adjudged liable, the defendant stockholders could compel contribution by a separate action. The Court said, *page 214:*

> "We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank, or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and, if so, it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in, and enforced contribution from all who had not paid their stock supscriptions. **Their equitable right to contribution is not yet lost.**" (Boldface ours.)

For the reasons stated, it is submitted that the decision of the court below is erroneous. We ask that its decree dismissing the amended bill of complaint should be reversed, and that the motion to dismiss the amended bill of complaint should be overruled.

Respectfully submitted,

HERMAN GOLDMAN,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

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In The

Supreme Court of the United States

October Term, 1937. No. 45.

PHILLIPS-JONES CORPORATION, Individually, and ANNIE G. PHILLIPS, SEYMOUR J. PHILLIPS and ABRAHAM S. PHILLIPS, Surviving Executors Under the Will of I. L. PHILLIPS, Deceased,

Petitioners,

v.

C. S. PARMLEY, C. H. PARNELL, EFFIE E. SCOTT, I. A. COOMBE, T. H. COOMBE, ROY UPDEGRAVE, ALVARETTA UPDEGRAVE, Administratrix of the Estate of R. R. UPDEGRAVE, Deceased, and MARGARET WILKINSON, Administratrix, d.b.n.c.t.a. of the Estate of B. C. GULDIN, Deceased,

Respondents.

Pro se

BRIEF FOR ONE OF THE RESPONDENTS, NAMELY, MARGARET WILKINSON, ADMINISTRATRIX d.b.n.c.t.a. OF THE ESTATE OF B. C. GULDIN, DECEASED.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Margaret Wilkinson, Pro se
PRALL B. ROADS,
Schuylkill Trust Bldg.,
Pottsville, Penna.
Atty. for Respondent above named.

Pottsville Republican-Schuylkill Reporter Print

ARGUMENT

The plaintiffs in this case, to wit, Phillips-Jones Corporation, Individually, and Annie G. Phillips, Seymour J. Phillips and Abraham S. Phillips, surviving Executors under the Will of I. L. Phillips, Deceased, in their Amended Bill of Complaint filed in the District Court of the United States for the Eastern District of Pennsylvania sitting in equity, asked for a decree directing contribution on the part of the respondents toward the payment of an assessment made by the Commissioner of Internal Revenue against I. L. Phillips, one of the stockholders and one of the transferees of the assets of the Coombe Garment Company, a Pennsylvania corporation, a corporation which liquidated its business and distributed its assets as liquidating dividends to its stockholders between July 15, 1919 and September 27, 1919.

The assessment made by the Commissioner of Internal Revenue against the said I. L. Phillips was entered on or about June 16, 1926, and represented unpaid income and profits taxes assessed against the said Coombe Garment Company for the years 1918 and 1919.

The above assessment made by the Commissioner of Internal Revenue was contested by the Executors of the said I. L. Phillips, the case finally coming before this Court and being decided adversely to the executors: *Phillips et al., Executors vs. Commissioner of Internal Revenue,* 283 *U. S.* 589.

Referring to the Amended Bill filed by the plaintiffs in this case and duly served, one of the respondents, namely, Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, filed a motion to dismiss.

Argument was heard on the said Amended Bill and the motion to dismiss, before the District Court of the United States, and that Court thereafter entered a decree dismissing the Bill for want of equity, and filed an opinion therewith in which that Court said, inter alia: (*record page* 21):

> "We accept the equitable doctrine relied upon by the plaintiff that when one is forced to pay a debt owing by himself and others he has a legal right to enforce contribution. The basis of it however is the debt obligation of the contributors. Here there is no debt obligation and hence no legal obligation to contribute. The most which can be said, and all which is averred in this Bill is that the tax which was assessed against Phillips might have been assessed against the defendants. Conceding that it might, the fact remains that it was not assessed. Neither the possibility nor liability to assessment imposed the tax. It was imposed wholly by the assessment and imposed upon Phillips alone. This was his misfortune. It may be and doubtless is true that he might have demanded that the tax be assessed against all. If it had been each would have been liable in solido for the whole up to what he had received from the corporation. If one had under compulsion paid the whole tax he could have enforced contribution from the others. Here, again, however, the demand would have rested upon the debt obligation. None, we repeat, is averred in this Bill. Again, Phillips when he was assessed

might have asked the others to agree that he should oppose the assessment on behalf of all and that the others would contribute. If they had so agreed there would have been a debt obligation. None however is averred."

"An analogue is supplied by tort feasors whose negligence has contributed to an injury. Each is liable to the person injured and either may alone be made a defendant and compelled to pay the whole damage. This, it may be said, is not fair nor just. The law of Pennsylvania has recognized this and provided a remedy. Without it, however, the defendant sued would not have a legal right to contribution notwithstanding that it might well be said that he 'ought' to be reimbursed. This is the claim presented by this Bill. The view taken renders it unnecessary to discuss the special grounds of demurrer."

"A decree dismissing the Bill for want of equity may be submitted."

Whereupon, the plaintiffs filed a petition for a re-hearing, which was granted, and thereupon that Court again entered a decree dismissing the Amended Bill of the plaintiffs for want of equity, and filed an opinion therewith in which that Court said, inter alia; (*Record page* 31):

"7. We can understand that any one might think that all stockholders should contribute proportionately to the payment of this tax. We can enter into the feelings of the plaintiff that selecting Phillips from among all the stockholders and requiring him to pay the whole tax was an arbitrary and unjust act. The injustice of it however did not prevent the

exaction from being made. The thought that the other stockholders should contribute is no legal reason for compelling them to do so. This compulsion can arise only because they have incurred a legal or equitable obligation to contribute. If there is no obligation to pay the tax there is none to contribute to its payment. The obligation to pay the tax arises wholly out of an assessment. If there has been no assessment there is no obligation to pay. Here there has been no assessment and hence there is no obligation to pay."

Whereupon, the plaintiffs appealed to the United States Circuit Court of Appeals for the Third Circuit, and that Court after argument, entered a decree affirming the decree of the District Court in dismissing the Bill in Equity filed by the plaintiffs, and filed an opinion therewith in which that Court said, inter alia: (*Record page* 37):

"The right to contribution is of necessity dependent upon a prior determination that the appellees are liable for the corporation deficiency tax. It was unsuccessfully argued to the Supreme Court that Phillips should not be solely liable for the entire sum of the deficiency. The inequity to Phillips is not without justification. The decision provide that the Commissioner may assess a tax in the summary fashion provided for by the 1926 Act; by a bill in equity, as in *Leighton v. United States*, 289 *U. S.* 506; or by an action at law, as in the cases cited in note 2 in *Phillips v. Commissioner*, *supra*. Phillips had the right to contest, and his executors did, in fact, contest the assessment before the Board of Tax Appeals, the Circuit Court of Appeals and the Supreme Court, with the Commissioner at all times a party liti-

gant. Phillips' executors would have had an opportunity to contest had the Commissioner initiated proceedings against them by a bill in equity or by an action at law. The contentions of the appellants, however, if sustained, would deprive the appellees of a similar right. Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established.

"The decree of the District Court dismissing the bill in equity is affirmed."

Whereupon, the plaintiffs applied to this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit, which was granted.

As stated by the United States Circuit Court of Appeals in its opinion referring to the case of *Phillips vs. Commissioner of Internal Revenue, supra*, 283 *U. S.* 589: (*Record page* 37):

"The Supreme Court sustained the right of the Commissioner to collect the entire deficiency through summary proceedings from Phillips alone. It did not, however, rule upon the right

> of Phillips to obtain contributions from the other stockholders. That is the question before us."

We respectfully submit that the difficulty in the contention of the plaintiffs is that they fail to make a distinction between what is a fair obligation and what is a legal obligation, relative to which and speaking for the Estate of B. C. Guldin, deceased, one of the respondents, and for the heirs of B. C. Guldin, deceased, none is financially able to pay the proportion of the contribution of the said B. C. Guldin toward the assessment made against I. L. Phillips by the Commissioner of Internal Revenue and demanded by the plaintiffs, and, hence, said respondent has contested this claim and is obliged to stand squarely on the law in the case, and not upon the determination of the question as to whether it is fair for this respondent to take such a stand and perspective in the matter. The undersigned, counsel for the Estate of B. C. Guldin, deceased, one of the respondents, has received no remuneration for his services, and expects to receive none.

We respectfully contend that there is no legal liability on the part of the respondents in this case which would afford the plaintiffs the legal right to enforce contribution by reason of the assessment made by the Commissioner of Internal Revenue against I. L. Phillips, because the assessment was not made by the Commissioner of Internal Revenue against the respondents along with the said I. L. Phillips, but simply and solely against I. L. Phillips, and as the United States Circuit Court of Appeals said in its opinion affirming the decree of the District Court dismissing the plaintiffs' bill: (*Record page* 37):

"The appellants would by implication add another method of imposing an assessment upon the stockholders, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

We, therefore, respectfully submit that the decree of the United States Circuit Court of Appeals affirming the decree of the District Court dismissing plaintiffs' bill in equity, should be affirmed.

Respectfully submitted,

PRALL B. ROADS,

Attorney for Margaret Wilkinson, Administratrix d. b. n. c. t. a. of the Estate of B. C. Guldin, deceased, one of the respondents.

SUPREME COURT OF THE UNITED STATES.

No. 45.—October Term, 1937.

Phillips-Jones Corporation, et al., Petitioners,
vs.
Lottie E. Parmley, Executrix of the Estate of C. S. Parmley, Deceased, et al.

On Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 6, 1937.]

Mr. Justice Brandeis delivered the opinion of the Court.

The sole question for decision is the stockholder's right to contribution.

In 1919, the Coombs Garment Company, a Pennsylvania corporation, wound up its affairs and distributed its assets ratably among its eleven stockholders. In 1924 and 1925, the Commissioner of Internal Revenue assessed against the company additional income and profits taxes for the years 1918 and 1919. To the extent of $9,306.36 these taxes remained unpaid. I. L. Phillips, a stockholder resident in New York City, had received in 1919 liquidating dividends in excess of that amount. In 1926, the Commissioner notified Phillips that it was proposed to assess against him as transferee of the corporation's assets this sum of $9,306.36, pursuant to § 280 (a) (1) of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 61). No notice of the deficiency was sent by the Commissioner to any of the other stockholders; no assessment was made against any of them; and no proceeding was instituted by him against any of them.

Phillips having died, his executors contested the deficiency assessed against the company and both the validity and the amount of the assessment made against him, insisting among other things, that in no event could Phillips' estate be held liable for more than his pro rata portion of the unpaid tax of the company. The Commissioner adhering to his determination, the executors sought a review by the Board of Tax Appeals. It held Phillips' estate liable for the full amount. 15 B. T. A. 1218. The United States Circuit Court of Appeals for the Second Circuit affirmed that judgment, 42 F. (2d) 177. And, in *Phillips* v. *Commissioner*, 283 U. S. 589, we affirmed the judgment of that court.

The Phillips-Jones Corporation, which was the real owner of the stock standing in Phillips' name, paid the judgment and the expenses of the litigation. Then it and Phillips' executors brought, in the federal court for eastern Pennsylvania, this suit in equity for contribution against the eight stockholders or their representatives, resident in that State. The District Court dismissed the bill for want of equity, on the ground that liability for the taxes arose solely from assessment under § 280; and that since the defendant stockholders had never been assessed they were not liable for contribution. In affirming that judgment the Circuit Court of Appeals said (88 F. (2d) 958, 959):

"Any stockholder, including the appellees, should be and in our opinion is, entitled to an assessment by the Commissioner prior to imposition of tax liability upon him. The appellants would by implication add another method of imposing an assessment upon the stockholder, namely, by an action for contribution. It is not for the courts to extend the methods prescribed by Congress for imposing tax liability. In the absence of assessment against the several appellees by the Commissioner, or, a decree or judgment of a court of record imposing tax liability upon them at the instance of the Commissioner, the liability to contribution in relief of the appellant is not established."

We granted certiorari. The injustice of allowing the other stockholders to escape contribution is obvious. And there is nothing in the applicable statutes, or the unwritten law, which compels our doing so.

First. The liability of the stockholders for the taxes was not created by § 280. It does not originate in an assessment made thereunder. Long before the enactment it had been settled under the trust fund doctrine (see *Pierce* v. *United States,* 255 U. S. 398, 402-03) that if the assets of a corporation are distributed among the stockholders before all its debts are paid, each stockholder is liable severally to creditors, to the extent of the amount received by him; and that as between all stockholders similarly situated the burden of paying the debts shall be borne ratably. But because the Commissioner was free to pursue Phillips alone for the entire amount of the unpaid taxes, Phillips could not compel him to join other stockholders in the proceeding, as was said in *Phillips* v. *Commissioner, supra,* p. 604:

"Whatever the petitioners' right to contribution may be against other stockholders who have also received shares of the distributed assets, the Government is not required, in collecting its revenue, to

marshal the assets of a dissolved corporation so as to adjust the rights of the various stockholders."

Second. The right of a stockholder transferee to contribution arises under the general law and does not differ from that of any other person who has paid more than his fair share of a common burden. The right to sue for contribution does not depend upon a prior determination that the defendants are liable. Whether they are liable is the matter to be decided in the suit. To recover a plaintiff must prove both that there was a common burden of debt and that he has, as between himself and the defendants, paid more than his fair share of the common obligations.[1] Every defendant may, of course, set up any defense personal to him.

Since the enactment of § 280, as before, a bill in equity against a stockholder transferee is a remedy available to the Commissioner to enforce the tax liability of the corporation. *Leighton* v. *United States*, 289 U. S. 506; *Hulburd* v. *Commissioner*, 296 U. S. 300, 303. If he had resorted to that remedy he could have sued Phillips alone (see *Phillips* v. *Commissioner*, *supra*, pp. 603-604); and if thereupon Phillips had paid the entire tax, obviously he could have brought a bill in equity against the other stockholders for contribution.[2] The right is no less where the Commissioner proceeds under § 280. This statute does not affect the duty of other stockholder transferees to contribute; it merely provides the Commissioner with a summary remedy for enforcing existing tax liability. *Phillips* v. *Commissioner*, *supra*, pp. 592, 594. As an incident of this summary remedy, the Commissioner must make an assessment against the stockholder or stockholders whom he elects to pursue. But, as each stockholder transferee is severally liable to the extent of the assets received by him, the Commissioner may pursue only one and need not make an assessment against other transferees. He elected to proceed only against Phillips; and as he succeeded in obtaining payment of the whole tax from Phillips' estate, he had no occasion to make an assessment against other stockholders. Indeed, after the corporation's tax had been paid he had no power to do so.

Reversed.

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[1] Compare Lidderdale v. Robinson, 12 Wheat. 594; Wright v. Rumph, 238 Fed. 138 (C. C. A. 5); United States Fid. & Guar. Co. v. Naylor, 237 Fed. 314 (C. C. A. 8); Carter v. Lechty, 72 F. (2d) 320 (C. C. A. 8); Allen v. Fairbanks, 45 Fed. 445 (C. C. D. Vt.); see M'Donald v. Magruder, 3 Pet. 470, 477; Southern Surety Co. v. Commercial Cas. Co., 31 F. (2d) 817, 819 (C. C. A. 3).

[2] Compare Richter v. Henningshan, 110 Cal. 530.